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Akadémiai Kiadó,
Budapest

STUDIES

Tamás Sárközy

The Present State and the Future Work of Hungarian Economic Legislation

1. Hungarian Economic Law Compared with Other Former Socialist Countries

1.1. *Traditions* have a rather great role to play in legal development. As Rabel used to point out, the goals are determined by the traditions of society and the means by those of legal dogmatics. Although the evolutionary process of the pre-1945 period was broken, the past kept awakening. Hungarian socialism with its "tamed" complexion similarly had peculiar traits of its own, which of necessity operated to determine the possibilities for the development of economic law in Hungary. Most important in this context was the fact that, in contrast to the Soviet Union and the former socialist countries of Eastern Europe, which have had to lay the foundations of a new economic legal order after 1990, Hungary arrived at the change in its political, social and economic systems with a *relatively developed* system of law that was partially equipped of the requirements even of a market economy, one that was serviceable, and it *did work,* once stripped of its attributes of socialist ideology.

The first very essential feature is that Hungarian civil law belongs to the so-called *German group of law* (Germany, Austria, Switzerland) so far as concerns its system of concepts, characteristics of legal dogmatics, and peculiarities of legislation and law enforcement. The fundamental role in its information is reserved of *legislation,* with comparatively little importance attached to judicial development of law and to customary law, but with comparatively great importance assumed by jurisprudence and legal ideology, as in the case with the so-called German *Professorenrecht.* Obviously, account should be taken of the practice of modern American commercial law (Western Europe

did not remain intact either), but we cannot adopt the methods of common law (e.g. the lack of formal requirements for companies).

Before World War Two Hungary had neither a written constitution nor a comprehensive code of private law. Much more developed was its commercial law, with its underlying Commercial Code (Act XXXVII of 1875) drafted on the German model. That Code governed the status of the commercial community, commercial associations (unlimited partnerships, limited partnerships and companies limited by shares as well as cooperatives) and the major commercial transactions. It was developed on a continuing basis, and the limited liability company, one of the most fashionable commercial association even today, came to be covered by Hungarian commercial law in 1930.

Formally the Commercial Code was not repealed after 1948, but it was rarely applied under the Stalinist economic system. While the economic enactments of 1988–89, mainly the Companies Act, adopted several of the Code's time-honoured provisions, they repealed a large part thereof, but some of its articles (e.g. on public warehousing) are still operative.

Nevertheless, the operation of Hungarian economic law continues to be influenced by the imperfect pattern of bourgeois development prior to 1945. Not all-embracing legal culture of commerce had evolved despite a noteworthy record of results. Considering the additional effects of 40 years of a Soviet-type socialist system working as it did against commercial culture as well, this situation unfortunately acts to complicate in large measure our present transition to a modern bourgeois society, for legal practice follows only with difficulty the forward-oriented provisions of economic law.

1.2. The period 1945–49 found in Hungary a *coalition government* during which the legislative activity favouring a bourgeois society (the land reform doing away with the feudal system of land tenure, Act VI of 1945 abolishing large estates) was increasingly displaced by enactments laying the basis for a totalitarian communist regime (e.g. Acts XIII of 1946 and XXV of 1948 on nationalization). The adoption of a Soviet system of commercial law was completed in effect after the Stalinist type of Constitution had been promulgated by Act XX of 1949. Its substance may be summed up as follows.

(a) The *basic form of property* was *state property,* with the State becoming the "single and indivisible" owner of the overwhelming majority of national wealth and representing the unity of the qualities of "public power and owner". (This was legally sanctioned by the Civil Code (Act IV of 1959, see Art. 174.) The primary enterprise form in the economy was thus constituted by *state enterprises* founded and managed as legal entities mostly by ministries (and, to a lesser degree, by local councils) (see Law-Decree No. 32 of 1950). In Western terminology, the state enterprise practically conformed to the legal structure of public-law institute (*öffentliche Anstalt,* the Soviet *predpriyatie*).

(b) The *cooperative* system was a subsidiary socialist form of social property. However, cooperatives lost their former features of commercial association. The principal form of the cooperative was the *collective farm* of the Soviet kolkhoz type (Law-Decree No. 7 of 1959). At the same time, unlike the Soviet Union, Hungary did not nationalize arable land, which was to offer numerous advantages.

(c) The Constitution and the Civil Code placed *considerable restrictions on private property,* recognizing artisans' and petty traders' right to ownership of their own means of production to a limited extent (Arts. 91 and 92 of the Civil Code), prohibiting the so-called profit-oriented capitalist property and related "associations leading to exploitation" (Art. 571 of the Civil Code).

(d) Economic guidance was basically provided by administrative acts (government and ministerial decrees, ministerial ordinances) rather than laws, with even plan targets appearing as administrative fiats.

(e) Inter-enterprise contractual relations were governed by the so-called *plan contracts* functioning as means of executing and breaking down plans and controlling plan fulfilment (Chapter XXXV of the Civil Code). Lawsuits between enterprises were removed from the jurisdiction of courts and were referred to the so-called arbitration boards of an administrative nature (Decree No. 51/1955. (VIII. 19.) of the Council of Ministers).

It should be noted, however, that this Stalinist model of the economy was *always of limited application in Hungarian law,* owing to its relatively short period of introduction (1949–53) and the so-called "gulyás" [goulash] communism, or the soft dictatorship of the Kádár regime, which emerged after 1956, civil rights and enterprise powers being *a priori* of a wider scope than in the Soviet Union or other peoples' democratic countries. Legislation played a larger role in state life and in the economy (apart from the functions of the Civil Code of 1959 as mentioned above, Act IV of 1957 regulated administrative proceedings, and certain areas of economic state administration were also governed by legislative enactments, such as Act IV of 1960 on Mining, Act II of 1964 on Posts, Act III of 1964 on Constructions, Act IV of 1964 on Water Management).

1.3. Launched on 1 January 1968, the *Hungarian economic reform* was an experiment seeking to reduce the role of the State in the economy and to increase enterprise autonomy without effecting a political reform (albeit through a relative softening up of the socialist political system). The reform was intended to create the so-called *socialist market economy* in which inter-enterprise commodity relations were to be governed by the state apparatus through reliance chiefly on the so-called indirect economic regulators and legislative activity. The 20 years of cyclical process, marked as it was by setbacks (consider the mid-1970s), failed to score a decisive success and to prove the possibility of a "socialist third road" different from the Soviet model, mainly for foreign policy reasons and due to ideological limitations, but it can claim great credit for having established the basic institutions of a market economy in Hungary, *thereby largely facilitating* a transition to a "*bourgeois*" *market economy* and a constitutional State when international conditions were ripe for it to force its way. As the science of civil law has always been linked up with the level of development of commodity relations, the Hungarian economic reform led, thanks primarily to the school of Gyula Eörsi, to a notable development *in the theory of Hungarian economic law,* which devised and improved market economy institutions, adapting them to concrete conditions, and tried to bring Hungarian legal development into line with the world trends of international commercial law

(emergence of *comparative jurisprudence*). The major institutions, still making their effects felt, of the law of the Hungarian economic reform may be listed as follows.

(a) The primacy of state property as declared by the Constitution and the Civil Code was upheld with slight changes, but the exclusive objects of state property and state monopoly came to be significantly reduced in number and scope, respectively, during the 1980s, whereas *expanding the autonomy of state enterprises vis-à-vis* the central state apparatus was a basic principle of the economic reform in Hungary, as was laid down for the first time in Government Decree No. 11/1967. (X.13.) and—following the amendment of the Constitution by Act I of 1972, which declared enterprise autonomy—in Act VI of 1977 on State Enterprises.

A conclusively decisive change in the status of state enterprises was brought about by a supplementary article to the Enterprise Act (Law-Decree No. 22 of 1984), which introduced an *enterprise management reform in 1984–85.* A subject even of subsequent heated debate, with its significant merits and demerits, this innovation, closely similar as it was to the Yugoslav self-management system, left as little as some 20% of state enterprises under administrative supervision, while the remaining 80% were transformed into self-governing enterprises, where almost all of the State's proprietary rights were actually transferred to the State enterprises and enterprise management was determined, not by the outside owner, but by the enterprises themselves. At the vast majority of *self-governing enterprises,* proprietary rights were exercised by the so-called *enterprise council* and, at a smaller part thereof, direct self-management by workers was established (enterprises managed by the general assembly or/and delegates' assemblies—10%). (This arrangement based on enterprise autonomy is fading away now, and the legislation of 1992 on the new public sector and privatization will cause the self-governing—self-owned enterprises to vanish from Hungarian economic life.)

In like manner, the Labour Code promulgated by Act II of 1967 (and operative until mid-1992) considerably expanded the autonomy of enterprises as well as workers in the regulation of employment relations. It *delegated the collective agreement to the enterprise level,* enlarged trade union rights, increased the freedom of notice, etc.

(b) Act II of 1967 on Cooperative Farms greatly increased the autonomy of cooperative farms and secured semi-private) household plots for farm members, while (Land) Act IV of 1967 opened room for creating independent cooperative land ownership. Cooperative schemes in industry, trade, house maintenance, savings banks and other areas were gaining ground rapidly as forms of common private activity. Unique in the East European countries, a *consolidated cooperative law* (Act III of 1971) emerged in Hungary as early as 1971, while the Constitution as amended in 1972 declared the equality of state and cooperative property. (This was not, of course, fully translated into practical terms.) Further restrictions were lifted by the amendments to the Cooperatives act in the 1970s and 1980s (although farm members had stopped becoming owners because the socialist ideological dogma of indivisible cooperative property still prevailed), and there came into being new and more flexible forms of cooperatives (auxiliary enterprises of cooperative farms, small cooperatives, specialized cooperative groups, which can be seen as forerunners of private undertakings in later times). The Land Act (Act I of 1987), was abolishing permanent land use

and the distinction between personal and private property as well as by lifting many restrictions on property, made further progress towards the institutionalization, at least partial, of private property.

(c) It was from the 1960s that the Company Law evolved, separately and first, in the cooperative sector (from 1961) and later in the public sector (from 1967). The so-called *economic associations* established by enterprises and cooperatives *inter se* were regulated for the first time by Law-Decree No. 9 of 1970 and then by Law-Decree No. 4 of 1978, not as traditional commercial associations, but as new entities like *joint enterprises* operating with liability assumed by members as surety and *unions* performing coordinative functions. (These still exist as forms of association; see Chapters IV and V of Act VI of 1988.) Setting up of joint ventures with western companies was allowed as early as 1972 (Decree No. 28/1972. (X. 3.) of the Minister of Finance), such ventures to take the form of the traditional companies limited by shares or limited liability company as regulated by the Commercial Code (but in practice joint ventures with Western companies were mere exceptions until about 1985).

(d) *Private undertakings* of a non-cooperative type did not play any significant role except in the last stage of the Hungarian economic reform. In effect, they saw their institutional environment created in the period 1979–81, when, separated from the so-called socialist sector, they constituted ancillary–subsidiary forms of economic activity (contracting out of shops and catering establishments, rental of enterprise units, use of civil-law societies for business purpose partnership; see Law-Decrees No. 16 of 1981 and No. 7 of 1982, Decree No. 30/1981. (IX. 14.) of the Council of Ministers, Law-Decree No. 15 of 1981).

(e) Also in certain partial aspects of economic management, numerous enactments deviated from the traditional socialist model without, of course, going beyond the frameworks of the socialist order of society. Outstanding among them was Act VII of 1972 on *National Economic Planning*, which abolished compulsory plan targets. The right of enterprises to engage directly in foreign trade was laid down in Act III of 1974 on Foreign Trade, and Act IV of 1972 which *abolished the arbitration boards* and integrated the economic courts into a single judicial organization.

(f) The system of plan contracts was formally abolished by Act IV of 1977 streaming from the Civil Code on a comprehensive scale (in point of fact, those contracts had become an exception as early as the end of the 1960s) and *suiting inter-enterprise contracts to the market model.* Among economic contracts, however, the contract for delivery and the contract of *locatio–conductio operis* remained prevalent. Act V of 1923 on *Acts of Unfair Competition* was revived by government decrees after 1968, cartels were prohibited, and the institution of economic court was introduced. This area was uniformly covered by Act IV of 1984 prohibiting unfair economic activities (and seen as the forerunner of a modern law of competition which was adopted in 1990).

(g) The germs of legislative coverage of *economic representative organizations* likewise appeared, framed mostly in other enactments. Accordingly the trade unions were covered by the labour Code and the national and territorial federations of cooperatives according to the Cooperatives Act. The *Hungarian Chamber of Commerce* became, in

several stages, the representative organization of state enterprises, chiefly larger ones, in the early 1980s (albeit with open and voluntary membership; see Decree No. 62/1980. (XII. 28.) of the Council of Ministers and Law-Decree No. 11 of 1985).

The foregoing perhaps goes to show that Hungary entered the process of change in the social system *with much more developed and market-oriented system of economic law* than the rest of East-European countries did. With minor modifications, a large part of the laws and regulations referred to above was transitorily suitable, even after the systemic change, to subserve a new bourgeois market economy.

2. Evolution of Economic Law during the Transition Period (1988–1993)

2.1. It is a characteristic of the economic law resulting from the systemic change in Hungary that the transformation of legislation began *before* the change in the political system. The first wave of laws and regulations resulting from the systemic change can be said to have occurred between the summers of 1988 and 1990.

The first and foremost law resulting from the change in the economic system was Act VI of 1988 on *Economic Associations* (Companies Act), which entered into force on 1 January 1989. The Act put an end to the sectoral fragmentation of the company law, placed nationals and foreigners on an equal footing in respect to conditions for joining associations, legitimized private *undertakings while opening practically unlimited possibilities to them.* Although a few ideological restrictions (e.g. a ceiling of 500 workers for private companies, which a private person could nevertheless evade easily by founding several one-man limited liability companies) were retained, most of them were eliminated early in 1990. The Companies Act has modernized the traditional companies forms and its intendment being incorporated both the development results of the Hungarian company law and the universal development trends of international trade, particularly the company law of the European Communities. Also, it employed new legislative techniques which may become a general feature of codification in a constitutional state, namely it contains no enabling provisions for enforcement calling for administrative regulations, the majority of its rules are permissive, etc. (The Companies Act has since undergone minor modifications several times, but it has essentially retained its basic structure.)

The Companies Act was followed up by a wide range of *"supplementary" laws and regulations* having the main elements as discussed below.

(a) As early as 1 January 1988 there came into force a *modern western system of taxation* (Act V of 1987 on Personal Income Tax, Act IX of 1988 on business Profit Tax), which was adjusted to the Companies Act with effect from 1 January 1989 and then has been refined annually in response to West European trends (e.g. introduction of a two-rate general sales tax in 1992).

(b) Enter into force concurrently with the Companies Act with provisions of financial, labour and customs law. (With minor modifications, it is still in force.)

(c) The *registry court and liquidation proceedings* were brought into line with the provisions of the Companies Act (the former by Law-Decree No. 23 of 1989 and the latter by Law-Decrees No. 11 of 1986 and No. 26 of 1988 no longer in force; Act IL of 1991 currently in effect will be discussed later) and have since been modified.

(d) Act XIII of 1989 on *Transformation* came into force in mid-1990. It governed transition from one form of association to another (e.g. transformation of a limited liability company into a company limited by shares) on the one hand and, operating as the first enactment on quasi privatization, transformation of state enterprises into companies limited by shares or limited liability companies on the other. (The Act ceased to have effect in summer of 1992.)

(e) A modification of the *Act on Cooperatives* (by Act XV of 1989) broke the earlier dogma of indivisible cooperative property and made the first step towards bringing members into a position of part-owners and approximating cooperatives to commercial associations. (This regulation was in force until 1992.)

(f) Act V of 1990 on *Private Undertaking,* which placed individual entrepreneurs (in small-scale industry, commerce, etc.) on an equal footing with associations in respect of conditions while creatively influencing regulations on associations, was passed in January 1990. It requires professional qualifications only for performance of activities, not for entrepreneurship itself, lifted the requirement of personal contribution also in the case of associations formed by citizens, and allows private undertakings to hire labour without a numerical limit (the ceiling was 30 from 1981 to 1988 and 500 from 1 January 1989 and ceased as of March 1990).

(g) The basic rules on securities were incorporated (by Act XXV of 1988) into the Civil Code. Act VI of 1990 on *Issue of Securities and the Stock Exchange* entered into force on 1 March 1990. Against this background the Stock Exchange began functioning in Budapest, and the Exchange Rules were adopted in summer of 1990.

(h) Act VII of 1990 set up the *State Property Agency,* a central organization representing the State as owner, to *enhance privatization,* while Act VIII of 1990 on *Protection of State Property* entrusted to state enterprises determined, taking into account the existence of the Agency, the procedures to be followed when state enterprises sell or lease out part of their property or contribute it to companies. (These enactments were in force until the summer of 1992.)

This review makes a detailed analysis only of economic legislation, but I should also mention the highly important activity of Kálmán Kulcsár and Géza Kilényi in the field of *public law-making* mainly in 1989, which created the constitutional ground works for the transition to a bourgeois democracy, a multi-party system, and a state governed by the rule of law. In addition to the constitutional amendments of 1989 and 1990, reference may be made to Act XXXIV of 1989 opening the way for pluralist elections, Act II of 1989 on the Right of Association, Act XXXII of 1989 on the Constitutional Court, Act XXXVIII of 1989 on the State Audit Office, etc.

2.2. Of course, neither *social consciousness, commercial culture, legal expertise, an adequately trained team of experts* (commercial lawyers, commercial judges and notaries public, auditors, assessors of property, etc.) nor an *appropriate infrastructure of physical*

facilities (registry court building, record-keeping, enterprise balance-making and accounting systems based on computer technology) were available to support and to keep pace with the extremely rapid and vigorous political transformations, which were gathering, increasing momentum as indicated above. As *legislative activity was forging ahead* without reliance on sufficient physical facilities and personnel, the positive tendencies necessarily came to be (and still are) attended by *numerous anomalies, malpractices, and other negative phenomena.* The sharpening political rivalry since 1989 has been an added contributory factor to manifestations of undue impatience in society and mass communications, with cases of abuse overstated and repoliticalized. It is difficult to appreciate that the price of inexperience has to be paid and disadvantages have to be suffered in the process of transition to a market economy. Since 1989 Hungary has also witnessed the unfolding of a political–scientific debate about the need (a) to transitorily endure malpractices while continuously improving the necessary set of conditions for eliminating them ("Liberal" view mainly...) characteristic of the Németh Government formed in autumn 1988) or (b) to take an immediate and administrative measure against anomalies ("etatist) trend mainly characteristic of Antall Government in power from May 1990).

Mention should also be made of a marked process of *economic deregulation* which Hungary pushed ahead between September 1989 and May 1990 in an effort to dismantle the former socialist "administrative State" (with the support of the World Bank). There were repealed about 6000 government and ministerial decrees (lower-level legislation) and, in March 1990, there passed a law on deregulation (Act XXII of 1990). Unfortunately Antall Government stopped the deregulation program, which required the ministries to present estimates of costs to be incurred and of ripple effects to be produced even by future laws and regulations. (This I consider to have been a significant error, and more will be said about the related aspects at a later stage.)

2.3. The legislative activity in 1990 of the Hungarian Democrats' Forum) led government coalition, which came to power after the pluralist elections in May 1990, had in fact three distinctive features.

(a) *The economic legislation of Németh's Government was continued,* with the submission of a Bill, previously drafted by Tamás Schagrin, on *preliminary privatization* in home trade and catering industry (Act LXXIV of 1990) and a Bill, excellently prepared by Ferenc Vissi and Imre Vörös, to *prohibit unfair conduct on the market* (Act LXXXVI of 1990, or the Act on Competition) and with the adoption of a price act (Act LXXXVII of 1990).

b) *There were modified certain partial elements of earlier laws in favour of state intervention with more vigour.* Thus, Act LIII of 1990 considerably extended the powers of the Property Agency, a state delegate was ordered (by Government Decree No. 20/1990 (VIII. 3.) to sit on the enterprise council at each self-governing state enterprise, and the Acts on Transformation and Enterprises were modified (by Acts LXXI and LXXII of 1990) to considerably reduce enterprise prerogatives, scale down the availability of legal remedies, and cut back enterprise sharing in the proceeds of privatization. With a view to protection against abuse, the Land Act was emended (by

Acts XLI and XXXVIII of 1990) to place in effect a moratorium on sales of state-owned immovable property by requiring the permission of *territorial committees for property protection* for the sale and lease of immovables, contribution of them in economic associations, etc.

(c) *Legislation in the field of public law* (e.g. enactments on self-governments called for by the self-governments elections of 1990) took precedence temporarily over economic legislation, and a struggle concerning political legislation got under way in Parliament; in this context, reference may be made to *compensation* of persons wronged mainly after 1945 (four independent acts and one supplementary act on compensation have been adopted to date), to Act XXXII of 1991 on Church Immovables, or to different protracted legislative initiatives for having "offenders" of the former regime called to account.

A *new program for economic legislation* was adopted after Mihály Kupa had become Minister of Finance. Its *first phase* embraced the period from spring to autumn of 1991 and its *second phase* was implemented in the first part of 1992. While the year 1991 was a period more of economic enactments of a "*financial*" nature, the year 1992 saw the emphasis placed on norms governing the status of *subjects at economic law.*

Among the financial acts of 1991 I would mention Act IL of 1991 on Final Settlement as well as on Bankruptcy and Liquidation Proceedings; Act XVIII of 1991 on Accounting, which incorporated Directives 4 and 7 of the European Community; Act LXIX of 1991 on Banking Institutions and commercial Banks; Act XV of 1991 on the Hungarian National Bank; Act LXIII of 1991 on Investment Funds, and, continuing the list of these, Act XXXVIII of 1992 on State Finances.

The first enactments on the *legal status of economic organizations* included Act I of 1992 on Cooperatives and Act XXII of 1992 (Labour Code). Then, in summer of 1992, three enactments on the State's business property virtually made a new law governing the public sector (Act LIII of 1992), consolidating statutory provisions in the field of privatization (Act LIV of 1992), and incorporated the regulations on transformation of economic associations into the Associations Act (Act LV of 1992).

2.4. From 1993 there appeared three tendencies in economic legislation (and will continue during the period 1994–98 as well):

(a) redrafting of sectoral economic laws (Acts on, e.g., Posts, Railways and Water Management), or streamlining of outdated enactments mostly of the 1960s;

(b) legislation "*supplementing*" economic regulations from the "human" aspect. This process was set in action by the Social Welfare Act at the end of 1992, and it includes plans for the adoption of a Labour Safety Act or an Act on Environmental protection, whereas the amendment in 1993 of the Civil Code was intended to substitute, as it were, for a "non-profit" law by introducing the institutions of corporate body and public foundation. The Bills on the Chamber of Commerce and occupational chambers also naturally fall in this category;

(c) increased efforts were being made for *partial amendments* to laws newly adopted in 1988–93 (see legislation on securities, the Stock Exchange, bankruptcy, banks, etc.). Such amendments were motivated in part by primitive technical errors committed "in the rush of legislation", in part by daily political goals.

How many of the large volume of bills already submitted to parliament will be passed into law before the elections of 1994 is a hard question to answer (considering the renewed emphasis on public law legislation (acts on national defence, the police, secret agents, etc.) and the electoral campaign now getting under way). On the other hand, a large part of the year 1994 is unfortunately likely to be lost on account of the elections for the adoption of "completely new" economic laws. The new government will have to review the legacy of its predecessor, to remove the etatist elements from the existing legislation, and to revise the bills not yet passed. In addition to the fundamental material requirement of adjustment to the new government program, the review of substantive elements will have to make allowance for the fact that

(a) a number of economic bills have long been shelved in Parliament. They include those on which *professional consensus* has been reached, but which no one has had an interest in dealing with (e.g. regulation of a Commodity Exchange). These bills should be pushed through soon;

(b) at the other extreme there are numerous "rough" bills, practically drafts prepared at clerical levels, which are totally *unelaborated* professionally and represent no more than formal, administrative execution of some government decision.

3. Analysis of Hungarian Economic Law and Its Expected Evolution in Some Fields

3.1. Commercial (economic) law evolved as a *mixed branch of law* at the end of the last century. Its precise definition is questionable even in Western Europe. Under the present set of Hungarian conditions, the following fields of law may be classed in this branch:

(a) law of private undertaking;
(b) law of economic association;
(c) law of state enterprises;
(d) law of privatization of state enterprises;
(e) law of cooperatives;
(f) company law;
(g) law of competition, cartels, control of monopoly and merger, and concerns;
(h) law of banks and insurance;
(i) law of securities and stock exchange;
(j) law of bankruptcy and liquidation;
(k) law of commercial accounting;
(l) law of commercial transactions.

It is to be noted on this score that

(a) certain elements of commercial law are deeply embedded in *civil law* (e.g. economic associations are legal entities at the same time, commercial transactions are civil-law contracts, transformation of state enterprises into associations amounts to joint succession of title under civil law);

(b) there appear, on the other hand, a good number of public-law provisions in commercial law (e.g. supervision over banks, insurance and securities; measures of the Office of Competition);

(c) substantive law is intermingled with a considerable number of procedural rules (e.g. registry court proceedings);

(d) lastly, economic law in the broad sense includes—along with the law of accounting, banks, insurance, securities, and stock exchange, which represented the borderline area of commercial law—the law of budget and taxes (fees), foreign exchange and customs, and individual and collective labour law (collective agreements, right to strike) as well as the legal institutions destined for conciliation of economic interests. The law of immovable property (land) is also closely related to commercial law, so it deserves a brief discussion in this review.

Some partial provinces of commercial law will obviously disappear or change at longer term. Thus, for instance, the law of privatization will be of interest until completion of privatization in an institutional setting, and, with privatization completed, little will remain of the separate law governing the public sector, since state enterprises will be transformed into commercial associations, and the cooperatives will presumably merge with economic associations in the long run.

The aforementioned fields of commercial law are not the whole, even in the West, become objects of the commercial code; it is mainly the law of competition or the law of banks that is usually covered by separate legislation. In many countries (Switzerland, Italy, etc.) there are no separate commercial codes at all, or the different forms of economic association companies limited by shares, or limited liability company, etc.) are regulated by separate laws independently from the Commercial Code (e.g. in Germany), whereas commercial transactions are covered by a uniform law of obligations in the Civil Code (e.g. in Switzerland and several other countries).

3.2. Hungarian economic (commercial) law has virtually developed outside the domain of the Civil Code before as well as after 1945, the laws of association, competition, bankruptcy, securities, etc. are embodied in separate enactments, while these separate provinces have been referred by a few definitive legislative provisions back to the Civil Code (see, e.g., Arts. 52 to 56 on associations, Art. 338/A–B–C on securities). This means also that *the parts of the Civil Code dealing with the subjects at law and ownership have virtually been renewed,* although by separate enactments (the only area that is not covered essentially for political reasons is a modern law of immovable property, with a *new land act* yet to be framed in the first place, but its adoption has so far been prevented by sharp conflicts of political and economic interests). On the other hand, *a comprehensive reform still has to be effected in respect to contracts,* which constitute a larger part, even in terms of articles, of the legal material in the Civil Code. The part dealing with obligations—primarily the types of contract in the special part on the law of obligations, but, to some extent, even the general rules governing contracts—are hopelessly *outdated* and are inept for satisfying the requirements of modern business transactions. (The partial modification in 1993 of the Civil Code can do very little to solve this problem.)

In the current situation *two tendencies* can be observed in the domain of commercial transactions. In the first place, practice relies on the permissive rules of the law of obligations for paving the way by creating *innominate or mixed contracts* (such as *contracts of syndicate* preliminary to contracts of association, contracts for *leasing of machinery and motor cars,* stock exchange transactions with securities, contracts of *factoring,* model contracts of *franchise* which are gaining more and more ground). On the other hand, *separate provisions of law* establish types of contracts like contracts of casino or contracts of gambling automats as introduced by the Games of Hazard Act, or the so-called contracts of leasing connected with privatization as recognized by legislation on privatization (see Art. 68 of Act LIV of 1992), or contracts for property management, use, services and portfolio (Arts. 76 to 78 of Act LIV of 1992), not to mention the *contracts of concession* possessing public-law elements, but practically representing a civil-law institution (introduced by Act XVI of 1991).

Yet this is *not enough,* for an urgent modification by a legislative enactment of the part of the Civil Code on contracts is inevitable, especially in the light of requirements for harmonization with the European Community. If a relatively full-scale and satisfactory reform of the Civil Code can be completed by 1996, there will be no need for a separate Commercial Code. If, however, the demands of extra-economic areas (law of personality, law of inheritance, etc.) retard the accomplishment of this goal, it is indeed the view held by most jurists in civil law branch, the need will arise for a new Hungarian *Commercial Code* to be drafted with urgency, and in that case the Code might also embrace the law of individual firms and partnerships, the law of cooperatives, the law of securities and banks, the law of accounting, and perhaps even the law of competition. This question may be answered by the Government in late 1994 or in early 1995. In theory, preserving the unity of the Civil Code would be the better solution, but if progress in this direction continues to be as slow as it has been until now, we may have no choice but to have commercial transactions regulated by a separate law.

3.3. The situation with regard to certain fields of economic law may be summed up in its main essence as follows.

(a) The *status of private undertakings in substantive law* in my view, is basically resolved, and the existing problems concerning incentives for small businesses are more in the nature of economic policy (taxation, availability of credit, book-keeping etc.). In effect there are three legal forms available: *"simple" undertaking* subject to possession of entrepreneur's certificate and with liability extending to all private property; *individual registered firm* likewise with full liability; and finally *one-man limited liability company* or *one-man company limited by shares* under the Companies Act (foundation by private persons of one-man firm was allowed by Act LV of 1992). The relevant legislation started, quite appropriately in my view, from one's *subjective right to entrepreneurship* and requires professional qualifications only for launching and actually carrying on a business. (This arrangement should be upheld despite attacks from proponents in the National Alliance of Craftsmen of the traditional guild–system artisanship–consider the

impact produced on individual businesses by the proposal to establish a chamber of craftsmanship).

(b) The *law of foreign investments* and foreigner's right to participate in companies have, *in their basic aspects,* been put on the right track by Act XXIV of 1988: there is no separate act on joint ventures, and foreigners are subject to the uniform Hungarian law of association. Some provisions of the Companies Act disfavouring foreigners to have been abrogated, and the legal status of companies with foreign participation (including customs-free zone and off-shore companies) has been settled. In this respect, too, the uncertainty of economic policy conditions (extent of tax relief, degree of differentiation, etc.) should be eliminated by partial modifications; this would call primarily for a new *customs law* and a *foreign exchange code* of a new spirit, which in turn cannot be expected until the full convertibility of the forint has been achieved, i.e. hardly before 1996, so in the interim we unfortunately must rest satisfied with piecemeal minor modifications of the foreign exchange and customs law in an effort to update them. Stimulation of foreign investments being a vital question for us, the relevant enactment should increase benefits for investors by an order of magnitude so as to maintain our competitive position in Eastern Europe. It would also be necessary for the legal status of the off-shore companies and *special economic zones* to be clearly defined by law.

(c) Act VI of 1988 on Economic Associations (Companies Act) has stood the test both of the systemic change and of practical verification, while being fundamentally in harmony with the law of the European Community. Apart from some slight technical modifications, *no essential change is needed in this domain,* but certain refinements are called for by practical experience mainly *in the chapter on corporations.* The available forms of association offer a basically sufficient assortment; in fact there is no need for the so-called *public utility companies* (although these are not a nuisance), and the most to be done would be to allow wider scope for silent partnerships. (The rigid regulation of civil-law society was rightly relaxed by the amendments of the Civil Code in 1993.) The growing *mingling of types* among forms of association can be handled for the time being by the permissive nature of the Act, whereas economic partnerships and intra-enterprise business partnerships (economic partnerships operating with liability assumed by legal entities) are slowly going out of existence (and the joint enterprise can be supposed to follow suit). What the new government will have to do in the first place is to eliminate from the Companies Act the etatist excesses—namely the ceiling on contributions to corporations and limited liability companies; the completely wrong regulation, contrary to the Civil Code, of the invalidity of contracts of association; etc.— which found their way into the Act during the Antall Government (mainly at he end of 1991).

(d) The rules of company law (and the law of registry court procedure) have often changed over the past period, but once computer-based modernization is completed, the time will probably come to promulgate a *uniform company law* to supersede Law-Decree No. 23 of 1989 with effect from 1 January 1996. I maintain that registration of economic subjects may be left with the registry courts (should not be referred to public-law

chambers on some western models), but registration proceedings should be considerably expedited, for instance by the agency of *company commissioners* without judicial qualifications.

(e) The rules on *final settlement and liquidation* are in effect serviceable, and the provisions on change in status (transformation, merger, demerger) have been greatly refined recently, facilitating decentralization and control over mergers. The *regulations on bankruptcy* as embodied in Act IL of 1991 are also basically satisfactory and are in line with European norms. However, it is a different matter that, owing to the distorted market conditions of Hungary, ringwise debts, etc., the application of the modern rules of bankruptcy law is attended by numerous *anomalies* in respect to Hungarian undertakings. The amendment of 1993 brought the Act closer to Hungarian realities, but in the ongoing process of debt and credit consolidation one cannot unfortunately preclude the need for additional amendments to the Act.

(f) The *law of concerns* embodied in Act LXXXVI of 1990 and that relating to corporations in the Companies Act will need closer aligning in future, but, apart from this, the law of *enterprise groupings* is in the making in Hungary as well and is, on the whole, not less developed at the present stage than the West European average (law of participatory, contractual and factic concerns; mutual, sizable and majority participation; law of holding, law of merger control).

(g) Our *law of accounting* practically meets the European requirements; its harmony with the law of association has been strengthened and the pressure for adaptation by Hungarian enterprises increased by the modifications of 1993 (e.g. in respect to consolidated balance-sheets). We must not back away from related requirements, which serve to promote progress but Hungarian enterprises find it hard to comply with, and we must do our utmost to give effect to the relevant Act in practice.

(h) Our *law of competition* is also basically on modern lines and conforms to EC norms. The existing problem lies mainly in that, on the one hand, the organizational concentration inherited from the socialist period hinders the normal operation of the law of competition and that, on the other, the present practice, unaccustomed as it is to competition, is unsure of what to make of modern regulations (e.g. on concerns). Actual legal practice needs time to grow equal to legal regulations moving ahead to fast in adaptation to European norms (Act LXXXVI of 1990). It appears advisable to have the Act slightly modified in the light of practical experience during 1994–95.

(i) The recent period has witnessed a rapid development of the *law of securities and stock exchange,* but the time will come by 1995 for the *first major refinement* of the Act of 1990 on the basis of practical experience. That opportunity should also be seized to fill existing gaps (concerning warehouse certificates, compensation bonds, cooperative securities, and certain aspects of the bill of exchange and change law not covered by international treaties). The basic provisions of the Civil Code on the law of securities should be aligned with the requirements of modern transactions, and the existing contradictions between the law of association, securities and stock exchange should be removed.

(j) A political battle *in the cooperative sector* flashed up in 1992 mainly in connection with Act II of 1992 on Transition. The significant political struggle—revolving around the

transformation of cooperatives from old-type into new-type ones, specification of members' property, and encouragement of members' withdrawal an dissolution of cooperatives (efforts at covert destruction of cooperatives)—has greatly degraged the Act on Transition from a lego-technical point of view. While efforts had been undertaken to modify that Act before it was published in Hungarian Official Journal (and proposals for addimenta, one more absurd than the other, have continued to be presented ever since), the real *Cooperatives Act* (Act I of 1991) met with unworthy (but perhaps beneficial) silence, although, framed in a structure similar to that of the Companies Act, it borough cooperatives much closer to economic associations, making the cooperative form suitable for investments. Unfortunately, for the time being, only cooperatives may transform into companies limited by shares or limited liability companies, the road "backward" not being unlocked (just as state enterprises may not transform into cooperatives, although numerous state ventures operated in cooperative form prior to 1945). It is to be hoped that the process of foundation of new, modern cooperatives will get under way in the near future and that the cooperative as a specific economic association operating on cooperative principles may form an integral part of the law of association in the more distant future (about 2000). The first steps in this direction may be taken by a minor modification of the Cooperatives Act before the end of 1994 (e.g. permission of votes proportional to property).

(k) The traditional *state enterprise* of socialism amounted, in the terminology of commercial law, essentially to a public-law institute (enterprise under supervision by state administration). The forms of so-called self-governing–self-owned enterprise (enterprise council, general assembly, delegates' assembly), which were introduced in Hungary in 1984, were, in my view, progressive in comparison with the traditions of socialist hierarchy in the mid-1980s, but were obviously *obsolescent* under conditions of a bourgeois market economy and cannot be brought into line with the EC pattern of enterprise forms. Precisely for this reason, it is sound policy for Acts LIII and LIV of 1992 to allow *transformation, practically over the space of two years,* of state enterprises *into forms of commercial association.* (Act VI of 1977 on State Enterprises can be repealed subsequently.) Similarly, one may concur with the endeavour to abolish, during a longer a period up to 1997, all outdated forms of "institutional" enterprise (e.g. subsidiary company, association covered by the Civil Code). As can be seen, this represents *considerable progress.*

It is a different matter that such transformations are intended by the two Acts mentioned above to be effected in a state-centred and overcentralized manner, virtually on the basis of discretionary government decisions, i.e. largely in the absence of *normative regulations* (thus allowing so-called political privatization, or bringing political adherents of the Government into economic position before the elections of 1994) and *in a uniform way.* These Acts proceed from the *unrestricted proprietary power of the State* and, doing away with the guarantees provided for enterprise autonomy after 1968, *treat the legal personality of state enterprises as a purely technical category* (contain provisions on the State's business property rather than state enterprises), thereby virtually exceeding the scope of legal personality (which represents the triumph of property law over separate status inherent in legal personality).

The property remaining in the State's permanent ownership was determined in too wide range (about 35% of the public sector, which is strikingly high) and the corporations transformed from state enterprises came undifferentiatedly under the control of the State Holding Company, a super-holding of the State.

Act LIV of 1992 is in fact a *uniform law on privatization,* which—considering the different legal and economic policy approach of the three earlier acts on partial privatization (on transformation, protection of state property, and the status of the State Property Agency) and their lack of transparency due to frequent amendments—may be viewed as a *significant unification of law.* Under the hallmark of the Antall Government's privatization policy since 1990, it codified the invariably state-guided course of privatization, but in certain aspects it made some refinements (e.g. conversion of enterprise property bonds to workers' shares, involvement of self-governments in privatization), provided a legal basis for the so-called self-privatization of enterprises (*privatization techniques of greater flexibility,* e.g. privatization-related leasing—which is, of course, insufficient but, at any rate, represents a point of departure). It should be noted that in 1993 the Government introduced several "privatization techniques" (?) for which the legislation of 1992 provides *no legal ground* (so-called mass privatization based on small investors' shares, buy-out managers).

I maintain that institutional privatization should be completed urgently after the elections, for a sound operation of a bourgeois market economy cannot be secured by means of the State's actual proprietary majority, transformation should not merely mean formal, or "legal" privatization, i.e. a "bogus" one from an economic-sociological point of view, and state shares in new associations should be abolished, while rapid privatization is presumably more viable if carried out in a decentralization should be modified substantially before the reorganized and amalgamated into a single State Property Agency Corporation, i.e. the top organ of privatization should function in the form of corporation. Also, effective privatization of banks is absolutely necessary, which implies the need for certain amendments to the Act on Banking Institutions. Insurance companies have actually be privatized, and the *Insurance Act* to be passed by all means in 1994 should be based on this background.

Part of the swollen "treasury" property should likewise be privatized, with the requirements of a substantive budgetary reform to be satisfied in this non-business portion of state property. the proposed *Act on Treasury Property,* delayed for years, should therefore be adopted at long last, although it is possible that this area might in point of fact be covered by the State Finances Act. In pursuance of this goal it would be particularly necessary to refrain from out-of-date arrangements incurring superfluous costs (e.g. there is no need for Treasury Directorates of Legal Matters).

(l) Act XXII of 1992 finally consigned to oblivion the former *Labour Code,* which had *perhaps* been *the most obsolete* of "socialist" legislations. In my judgement, the new Act did well to place individual employment relations on a purely contractual basis along modern lines. I think that in respect of individual labour contracts *there is no place for any significant restrictions to the detriment of workers'* as has been suggested by representatives of international companies operating in Hungary. The truth cannot be

questioned of the assertion that it is impossible to enjoy human rights in the western way, to consume in the western way, and to work in the Eastern (or, if you like, "socialist") way. Nevertheless, Hungarian workers have already come under much greater *social pressure* than existed before, while privatization brings added pressure on them to come to terms with the new realities. Irrespective of the Act on Strike, which guarantees really excessive rights, there has so far been no major wave of strike, and it has been possible to maintain social peace, thanks indisputably to the moderate policy of trade unions, an achievement which it would be unwise to call into question by amending the Labour Code soon after the new government takes office. At joint ventures, a greater intensity, more efficient performance and more advanced standards of work, combined with higher wages and other benefits, can be ensured anyway.

The vulnerable spot of the new Labour Code is the regulation of *collective employment relations,* since this unquestionably was rush-and-ready work. Yet no satisfactory regulation of collective employment relations can be legislated until a system of employers' and workers' representative organizations adequate to a bourgeois market economy has been devised in Hungary and an institutional process of conciliating economic interests between employers, workers and the government has been set in train. Institutionalization of legal entities under public law in accordance with liberal principles (public-law bodies, chambers, public institutes, public funds and legal distinction between political parties, trade unions, economic representative organizations, and lobby associations could be made suitable by a modification of Act II of 1989 for providing a stronger underpinning for the collective right to work. (This notwithstanding, the laws on "conciliation of interests" and on non-profit organizations will definitely be needed in 1994–95).

(m) Stabilization of agricultural production will be a key issue of the new government's economic policy, and it will call for both a revision of the Act on the Administration of Agriculture and an early adoption of a *new Land Act* radically different from that of 1987 and governing not only arable land. The most appropriate solution would be to draft a *comprehensive real estate code* applicable to all immovables. (In connection with it, a thorough reform of real estate registration is equally necessary, in particular through reintroduction of the institution of the real estate register kept by courts, as has already been suggested.)

A real estate code would be needed as early as possible, but not later than 1995. If the HDF-led coalition government succeeds in pushing through the Act on Arable Land before the elections of 1994, the Act will have to be modified immediately after he new government takes office. Unfortunately, legal logics would have dictated adoption of the Land Act before the Cooperatives Act and the Compensation Act, but this order was reversed for political reasons. The basic idea of the new real estate law should be to get rid at last of the outdated institutions of both the socialist and the pre-1945 real estate law. Thus, *there is no need for the "management" right of state enterprises,* and it is generally ill-advised to have ownership and leasehold institutionally separated. Such "transitional" institutions as the so-called proportional landed property of cooperative farm members, which has been introduced recently, should also be aligned with the

fundamental civil-law institutions (in our case, with common property to be established). In like manner, associations in general should be brought into a proprietary position, subject to specific conditions as stipulated in contracts of syndicate, in respect of state property in their use.

I do not believe it necessary to place a ceiling on land possession and to restrict acquisition of immovable property by foreigners, regardless of whether such restriction is consistent with the Constitution at all. In recent years there has been no evidence of masses of foreigners seeking to acquire arable land, and the possibility of abuse on account of the rather low market price of arable land can be ruled out by setting the lowest official price in accordance with the Price Act now in force. What should be disallowed is not acquisition of property by foreigners, because Hungarian agriculture is in need of capital, while any significant volume of capital investments can only be expected from abroad, and to expect a larger volume of investments without property, e.g. on lease, is a *mere illusion.* Rather it would be necessary to impose *obligations for cultivation of land and employment of labour* above a certain limit of possession to be fixed by law or contracts of syndicate, as is the case in several countries of the West.

Individual land property acquired by virtue of the Compensation Acts or otherwise *should naturally be respected* and, where realistic conditions exist, individual farming should be supported by the State. It is clear, however, that in 1990–94 a large number of land possessions were procured on which the owners do not want to engage in farming or which are strip holdings on which farming is destined to be unprofitable according to international comparative figures. Legislation should make allowance for this and permit interested parties to keep together, *subject to their voluntary* option, such areas of land as cannot be utilized except on a large scale. Unless the possibility of independent cooperative landed property is reopened, our cooperative farms will be transformed *en masse* into companies limited by shares or limited liability companies.

Also, a modern real estate code will leave room for development in several related fields like streamlining in the Civil Code of *lien* or mortgage serving as security for bank credit, or reframing of laws governing property in forests and pastures (held by associations), hunting, fishery or water management. (No doubt, this legislative process will unfortunately last until 1996.)

(n) In conclusion, I would make a few remarks about the need for *modifications of the Acts on Taxation and Social Insurance.* As related questions (e.g. family taxation) depend heavily on the economic policy of the new government, there is not much to say from a legal point of view at this time. At any rate, one should obviously count on important amendments to the Acts on Taxation and Social Insurance in relation to legislation on the supplementary budget in summer of 1994 or on state finances for 1995.

Then, however, efforts should be undertaken, in connection with the reform of state finances and the *system of economic regulators relative to undertakings* and to ensure that entrepreneurs will be informed of absolutely necessary modifications not later than 1 October of each year, namely at least 3 months before modifications usually take effect on 1 January of next year. Obviously enough, no absolute constancy can be promised in

a process of social transformation going on in such a wide scale as this and in the face of so strong an economic recession as this, *but the government must do all it can be done for the sake of entrepreneurs' relative legal certainty.*

4. A Program of Economic Legislation and Remarks on the Technique of Law-Making

4.1. From the foregoing it may have become clear that about 80% of the primary economic laws governing a market economy have been passed by 1994. This is a significant result in which the Antall Government and the HDF-led government coalition can also claim a share despite all criticism. (In possession of sufficient power it is relatively easy to create a dictatorial state by coercive measures, but it is extremely difficult to dismantle it by way of reforms and by methods of a constitutional state.) A shortfall is basically observed in respect of the so-called secondary laws governing special fields and supplementing economic regulations in the human aspect. (I think that the situation is similar in the fields of public-law legislation, which is not a subject of this analysis, the lag being more noticeable in the so-called human areas.)

While the volume (quantitative indicators) of the legal material is in the main satisfactory as a result of some 5 years of development process, *the quality of the legal material,* i.e. the professional standard of legislation, *is* clearly *unsatisfactory,* meaning that

— laws and regulations are insufficiently elaborated in conceptual terms and contain a great deal of *inner contradictions*;

— laws and regulations are insufficiently elaborated in technical terms and contain *numerous errors of codification* (structure, wording, etc.);

— *laws and regulations lack appropriate synchronization,* being often in conflict;

— *the legal material is marked by ebbs and flows,* some enactments outpacing others (e.g. the law of securities and the law of banks keep ahead and the law of insurance lags behind);

— the "*secondary*" old and outdated legal material (chiefly earlier decrees) is in conflict with the *new primary law* (market economy legislation) now in the making, giving rise to constant problems of constitutionality;

— *the legal material is unstable,* amendments for short-term political reasons (impatience, aggressive lobbying, etc.) to new enactments being unjustifiably great in number.

Of course, these shortcomings have been almost inevitable. The relatively low level of quality is a *typical phenomenon of the transition* objectively resulting from unsettled social, economic and political circumstances and the demand for accelerated legislative activity (rush of legislation). Yet there are a few "subjective" causes, too, which should be eliminated in future.

(a) In the process of transition Hungary *has lost virtually all* of its codifiers of economic law, a team of experts formerly prominent in Eastern Europe, and its current team is professionally inefficient. To change this situation within 2 or 3 years would call for general as well as special training (explicitly in codification) with the help of the European Community.

(b) The order of the codification process has been upset, there is no appropriate scientific substantiation, preparatory work is unsystematic and hasty, planned and organized coordination of laws and regulations is lacking.

(c) Both public administration and MPs (most of whom have had no pre-training in state organization and codification; a self-employed lawyer cannot codify automatically) are *totally inexperienced in the legislative technique of a pluralist parliament.* Neither the Government nor the Parliament have an appropriate apparatus capable of doing this work, improvisations are legion, political debates on bills are often hysterical and chaotic, hundreds of self-centred and low-standard motions for amendment presented by MPs make bills impossible to review, hence motivations to Acts are often contrary to wording, etc. (This is an added reason for discontinuing the practice of publishing motivations in the Hungarian Official Journal, which is in turn a notable hindrance to application of law.) In many cases the text of an act is almost impossible to be established after plenary session of Parliament, which explains frequent delays in promulgation, recurrent rectifications in the Hungarian Official Journal, the large number of "misprints".

4.2. I think that the task of codification during the period from summer of 1994 to early 1997 will be threefold.

(a) The primary acts on a market economy that are still lacking should be passed.

(b) A mass of secondary and supplementary acts (governing special fields, etc.) should be adopted.

(c) The existing legal material should be *modified* on an institutional basis so as to

— reduce undue state intervention and strengthen the liberalism of Hungarian economic law, which was upheld in its basic aspects during the period 1990–94 as well;

— eliminate contradictions and lack of harmony within and between laws and regulations and remove technical errors of codification;

— *verify by 4 or 5 years of practical application* the fundamental laws on a market economy (associations, securities, competition), which were drafted on a purely theoretical or comparative basis (since it was not possible for a domestic practice to develop under conditions of socialism) and infuse positive practical experience into legislation.

If this triple set of tasks is accomplished and full-scale harmonization with the law of the European Communities is concurrently effected, *we shall be able to develop an integrated system of economic law of an appropriate standard* by mid-1997. *This is in line* with the conceptions that

(a) Hungary's economic growth can be expected to pick up momentum in 1997 and may be considerably promoted by a uniform system of law consistently oriented to a market economy and based on private property;

(b) government policy is supposed to undergo a radical change in terms of both leadership line-up and working method in early or mid-1977 (because economic revival needs other personalities than crisis management does, "politically worn" leaders should be replaced, and a new offensive strategy should be formulated as part of the preparations for the elections of 1998);

(c) a new Constitution, the elaboration of which should be started after the new Parliament has assembled, may be envisaged for 1997. There should be set up a *broadly based constituent committee headed by the President of the Republic,* its vice-chairmen to be the President of the Hungarian Academy of Sciences and the Minister of Justice and its members to be appointed by the President of the Republic from among MPs, scientific authorities, and public figures.

As regards the substance of codification during the next years, attention should also be drawn to the following.

(a) Economic legislation in Hungary has so far necessarily run ahead of the actual situation (*"core" legislation, program-giving laws*) with institutions often introduced without the required objective and subjective conditions (e.g. registry court supervision over all associations with registry courts hardly functioning, adoption of a western-type accounting law without qualified auditors and assessors of property, or of a stock exchange law without appropriate actors at the Stock Exchange). This has given rise to *constant conflicts between legislation and practice.* It should be a basic principle to resolve such collisions by *ending the Hungarian "misery"* rather than "adjusting backward", under the pressure of practice, such laws and regulations as keep ahead of the underlying circumstances. A modern government should wait patiently during the period of transition. At the same time, however, the work of codification after 1994 should aim to *narrow,* also from the aspect of codification, the yawning gulf between legislation running ahead in response to modern international trends and an unduly old-fashioned application of law. The subjective and objective conditions for a modern application of law should be created, awareness of this need should be promoted, the law enforcement agencies should be awakened to the need for efforts to enforce laws and regulations by observing legality yet applying them in a creative way with a view to refining them. The pressure of judges and lawyers for *unduly casuistic law-making* should be resisted despite the great pressure of practice. Too detailed laws and regulations tend to increase the convenience of law enforcement agencies, to make them shy of accepting responsibility, and to cause legislation to become dysfunctional. A market economy is best served by a "well-aired" legislation "embracing" it, but imposing no unjustified restrictions on the freedom of enterprise.

(b) Harmonization with the law of the European Community should be on a full scale. Related efforts are under way, but

— work is *not sufficiently organized and planned* (is fragmentized among different government organs);

— while *the primary market economy laws* (acts on associations, competition, accounting, etc.) *have been effectively harmonized with the European Community,* no

comparative analyses are generally made of secondary sectoral economic laws and their harmonization is neglected (e.g. media laws);

— the laws drafted by "*German*" and "*British*" techniques are in conflict (the law of association and the law of competition are governed by German dogmatics, but the law of banks, the law of securities, etc. follow British dogmatics).

Future harmonization with EC should embrace the entire legal system, and setting up a "Ministry of European Affairs" could be of great use in this process. The Act on Legislation should be amended to provide that conformity with EC must be stated in general motivations to all major enactments. (Of course, it is possible to deviate from EC law and to opt for national solutions, but the reasons for deviation must be stated explicitly. Harmonization with EC will thus be consistent with the protection of national interests as well as with respect for the traditions of national law.)

(c) The economic legislation mainly of 1988–90 sought to reinforce undertakings, and less attention was given to legislation on the *protection of creditors and consumers,* another side of a modern market economy. This lost ground must be made up not later than 1995. Also of relevance is naturally the fact that the economic possibilities, which have opened up suddenly, have of necessity generated *tendencies to crude capitalism* which may at first be combated legislatively within limited frameworks, for it is not desirable that creation of legal sanctions against a few cases of abuse should raise obstacles to establishment of hundreds of healthy undertakings. Manifestations of unfair conduct have in recent years cried for excessive state intervention (increased control, etc.). Legislation should continue to exercise caution in preventive protection from abuse or else it may even stifle healthy undertakings. This does not affect the need for appropriate sanctions, however. Thus, for instance, it is advisable to give consideration to *quasi criminal-law actions against organizations,* since anti-social acts in the economic domain are committed mostly by legal entities (organizations). (As a matter of fact, there is practically little possibility to give effect to personal responsibility in this sphere, but severe fines are apt to bring a greater influence to bear on the behaviour of organizations.)

4.3. The next government will have to draw up a realistic program of legislation (including laws and government decrees alike) *for each year* and to present it to parliament *for its information* not later than 15 October of the preceding year. The draft program should be debated by parliament at a one-day sitting, and the program eventually modified by the Government pursuant to the outcome of the debate should take the form of government decision and be published in the Hungarian Official Journal. The program should be a realistic and realizable one (the Government's current program of legislation contains a large number of bills which are unlikely to come up for debate).

The year 1994 is a special one. At a time of change in government a review should be made of the draft laws left behind by the present Government. It is against this background that it will be necessary to draw up

(a) a four-year *general proposal* for the full term of the Government (to be treated as an internal document, which can be translated into concrete terms mostly until the adoption of a new Constitution in 1977);

(b) a *concrete annual program for 1995* (to be submitted to Parliament), with an indication of the organs in charge and the target dates;

(c) an *operative plan* for the rest of 1994, which should be prepared before the elections. It is highly important that the draft laws envisaged should be submitted to Parliament immediately after the new government has been formed.

In addition, there are two more comprehensive packages of draft legislation to be prepared and/or submitted at the end of 1994 and in spring of 1995.

(a) The bills *on the content of which there is professional and political consensus* (e.g. the Bill on the Commodity Exchange already mentioned), but which have so far been relegated because of bills of greater political urgency should be selected from the economic bills already submitted to parliament and should be supplemented with *motions for minor amendments* (e.g. to the Competition Act) which are also professionally ripened and have no particular political substance. All of these should be debated as a matter of urgency.

(b) There should be drafted, with the cooperation of ministries, a comprehensive *law* and a *government decree on deregulation,* similar to those of 1990, to repeal superfluous laws and regulations adopted during the past four years, thereby allowing wider scope of action (their substance will be discussed in detail at a later point).

4.4. It will no doubt be necessary to change the organization and methods of legislation. In the light of the foregoing, it would be advisable to devise an organizational system under which preparatory work would be done

(a) by the *Prime Minister's Office* regarding complex economic and public administrative laws and regulations of paramount importance;

(b) by the *Ministry of Justice,* mostly with the involvement of a team of outside experts, regarding traditional large codes;

(c) by *ministries* regarding special departmental regulations.

Under this arrangement, coordination of preparatory work would be the responsibility of the Prime Minister's Office rather than the Ministry of Justice.

I believe that this organization of codification can be *more differentiated* and *more efficient* than a core group of 100 to 150 specialists which, conceived in the Ministry of Justice, has in my view no reality in terms of professional expertise, and it may perhaps have a better organizational underpinning than the similar device to be headed by a *government commissioner* for legislation as proposed by József Torgyán, for this idea is, in my way of looking at it, better suited to the present pattern of governance through a prime minister and to the reality of the available staff of experts. Otherwise it would be for a government decision to assign, under the adopted program of legislation, responsibility for the preparation of concrete items of legislation to competent departments, the Ministry of Justice and the Prime Minister's Office.

It stands to reason that the Prime Minister's Office cannot take charge of preparing but a small number of complex laws of paramount importance and of socio-economic relevance (e.g. real estate code, companies law, law of cooperatives). Yet at the "central" level there is a greater chance to have them elaborated more efficiently and adopted more

quickly, since the Prime Minister's Office takes care of coordinating economic and social interests and securing representation in Parliament, so the bills concerned are more managable in this manner. Of course, the overwhelming majority of laws and regulations governing special fields should continue to be drafted by departments, and the Prime Minister's Office should not but coordinate preparatory work (but, given the present pattern of government organization, it is nevertheless more suitable than the Ministry of Justice for this task).

Preparations for codification in respect to the traditional large codes (Civil Code, Criminal Code, procedural laws), which represent "pure" branches of law, would invariably be within the purview of the *Ministry of Justice.* However, these codes can no longer be drafted in that Ministry as the necessary staff of experts cannot be lured back to public administration any more. In effect, the Ministry of Justice should undertake to perform "secretarial" functions of a *working group composed mostly of outside collaborators* (experience shows that research scientists as well as practical specialists willingly contribute to impressive codification efforts), should guide the working group, should attend to coordination at administrative, political and representational levels, etc. As not even preparations for large-scale codification can last forever, greater efficiency of work should be sought.

Codification is a profession. Preparation of laws, their entire fabric, structure and language are subject to professional criteria, which must be observed and the Government must have observed. It is therefore advisable to bring it into line with the new political regime and to substantiate it professionally. An added requirement for legislative acts is to leave sufficient time of transition for putting regulations into effect and enabling practice to apply them. Laws should have substantive motivations. As enforcement of economic laws is conditional on *relative professional consensus regarding their substance,* such consensus must not be distorted by political improvisations and short-term considerations of power. Political debates both with political parties and within the Government should be centred on regulatory concepts, wording itself not to be a subject of political debate so far as possible (at present, discussions in first and second "readings" at government meetings often indicate that a legislative concept or a given wording is not yet settled).

Finally, *the possibility of amendment must not be misused.* Constant demands for modification (see the Cooperatives Act or the Land Act) tend to create legal uncertainty. It is better to tolerate even misplaced articles for a few years than to keep modifying laws. It is an old truth that a "bad" stable law is better than one in flux. After a lapse of about three years, however, every major legislative enactment should be subjected to *ordinary review,* with provisions that have proved faulty to be corrected concurrently.

Since deregulation has a basic function to fulfil under a pro-business government, but this institution is attended by numerous misunderstandings in Hungarian practice, I will conclude by a brief survey of *deregulation as a new basic technique of modern legislation.*

5. *Organization of Deregulation*

5.1. In a scientific sense, deregulation is resorted to on two planes:

(a) *deregulation ex post,* which serves to sort out the legal material in force in order to repeal, in a planned manner (at certain intervals), administrative-bureaucratic provisions of law that have become outdated in the meantime, impeding economic and social self-initiative, every new legislative enactment carries out some deregulation automatically (repeal and modify old rules), but what we have here is a separate, institutional and comprehensive scheme of deregulation, or revision of laws and regulations;

(b) *deregulation ex ante,* which is intended to estimate in advance the *direct and indirect costs* to be incurred in connection with the application, as well as the *socio-economic implications and ripple effects,* of every law of socio-economic relevance (a decision on this should be made when preparation of laws is started, and related work may exceptionally cover even legislative provisions of a lower hierarchical order than law). Deregulation of this type is the responsibility of the organ in charge of preparing legislation. Its methodology (mathematical method!) has been elaborated by the so-called Chicago school (Posner) in the USA and has made its way into Western Europe as well.

Both planes of deregulation are of equally great importance to a *modern liberal State.* Deregulation *ex post* is aimed at streamlining the legal system, keeping it "in repair", while deregulation *ex ante* enables politics to *see in advance* the consequences of the legislator's decisions. To avoid any misunderstandings, politics and parliament may introduce a new institution regardless of considerable financial implications, but deregulation helps them develop an *awareness in advance* of the costs and other consequences of a particular legislative act. Deregulation is disliked by *politicians guided by emotions* as well as by the *traditional* apparatus of public administration, the latter seeing sizable extra work in it (and in mathematical legislation unfamiliar to them) and the former being loath to hear of such mundane things as costs.

5.2. The introduction of deregulation in Hungary unfortunately coincided with the term of office of the last "communist" government (summer of 1989) and was therefore easy to discredit "on the cheap". Nevertheless, some lessons were offered even by that abortive attempt. Decree No. 1103/1989. (VII. 25.) of the Council of Ministers was the first to adopt a program of deregulation oriented to a comprehensive revision and modernization of the *system of economic law.* That measure envisaged restricting state intervention in the business of the actors of the market, removing bureaucratic regulations impeding economic activities, widening the scope of self-regulation by economic actors, and reducing the administrative burdens on entrepreneurs. In addition, synchronization with the law of the Economic Communities had also to be considered (a task which was then a plus to deregulation in the narrow sense, but which can now be accomplished separately).

In pursuance of these goals, the Council of Ministers set up a Council of Economic Deregulation in summer of 1989. Headed by a government commissioner and composed of legal and economic experts appointed by the Prime Minister, that body was entrusted with drawing up its program of deregulation, formulating its conceptual criteria, taking

a stand on keeping in force, abrogating or streamlining economic laws and regulations, commenting on new draft legislation in the work of deregulation among departments.

Economic deregulation began on 15 September 1989 and was subject to two main requirements.

(a) On the one hand, departments had to revise decrees and decisions of the Council of Ministers, ministerial decrees and secretary of state orders as well as ordinances and legal directives issued prior to the above date and affecting their respective areas.

(b) On the other hand, they had to transmit new draft laws and regulations to the government commissioner and the Council for their comments on deregulation. In case of differences of opinion, the position taken on deregulation was discussed by the Council of Ministers, which decided on implementation.

After deregulation had been embarked upon, Government Decree No. 1143/1989. (XI. 26.) instituted a scheme of *deregulation in public administration* under the guidance of a separate government commissioner, so revision and modernization of legislation progressed on two lines. However, that separation of work was relative and transitory, and *clearly wrong from a theoretical point of view.* At that period it was justified by the fact that the economy needed a larger measure of state devestiture. Economic deregulation was focused on streamlining the legal material regulative of relations between the State and economic organizations, whereas deregulation in public administration was aimed at implementing the deregulatory principles in respect to laws and regulations affecting citizens and their organizations in other than economic aspects.

The economic departments concerned revised the laws and regulations in their respective fields by 31 December 1989, proposing the abrogation of 130 decrees of the Council of Ministers and 417 departmental regulations, initiating the updating of 300 regulations, and undertaking to rescind some 1300 ordinances and legal directives. The Council studied those proposals and advised repeal of additional 400 enactments at the Council of Ministers and department levels.

As a result of coordination there were repealed, by the deadline of 1 May 1990 as fixed in Decree No. 103/1989. (VII. 25.), 257 Council of Ministers decrees and decisions as well as 709 ministerial decrees, or a total of 966 legislative acts. In addition, the departments rescinded a total of 1250 normative ordinances and legal directives (Act XXII of the economy). On the other hand, the laws and regulations modified according to the criteria of deregulation numbered some 300. *The final result was the disappearance from the legal system of nearly one-third of about 3000 laws and regulations falling within the scope of economic deregulation.*

5.3. The prime goal of the revision in 1989–90 was to cut back on bureaucracy, and in this sense it undoubtedly allowed greater leeway for entrepreneurs, but in terms of economic substance this series of measures could not make but little headway in deregulation, lack of time and the unpreparedness of the apparatus did not leave much room for analysis of socio-economic costs. Moreover, it was not possible to repeal a number of outdated aministrative norms, because

— the economic policy concept of streamlining (e.g. social insurance, accounting) had not been sufficiently elaborated;

— administrative norms emanated from laws, but new enactments could not be passed before the elections (this made it necessary to postpone the revision of regulations on labour safety, statistics, customs, foreign exchange, etc.).

With a view to meeting the requirements of deregulation *ex ante* as determined in the advanced western countries and to evolving a uniform practice, the Council of Economic Deregulation issued for departments detailed *Guidelines* for drawing up draft regulations, with a request to prepare motivations to the drafts. (Formulated by András Sajó, the Guidelines were found by foreign experts to be of an appropriate standard.) According to the Guidelines, motivations to new legislative enactments amply cover

— the reasons for deregulation, also indicating why a particular field cannot be left to self-regulation by the market;

— verification of the legal source of regulations (existence of statutory authorization, etc.);

— foreign arrangements concerning the subjects of regulations and the reasons for eventual deviations from them:

— the effects of regulations on conditions for participation in economic competition;

— changing in conditions influencing actions on the market;

— probable impacts of regulations on state responsibilities (powers, administrative staff size, system of sanctions);

— budget outlays to be incurred, burdens to be imposed on entrepreneurs, and material, social and moral gains to be yielded by regulations.

The experience of deregulation concerning new legislation were unfortunately *unfavourable* in 1989–90. There was no way of enforcing efforts at preparing the ground for a real deregulation. The intervening factors included lack of previous practice and inexperience in cost-benefit analysis. Often the criteria of deregulation could not be met under pressure of time brought on by hasty preparatory work which the rapid pace of socio-economic transformations dictated. However, last but not least, the apparatus of public administration was preoccupied at the end of 1989 with their place in the new regime and were reluctant to expend energy on deregulation.

The start-up of a deregulation scheme was envisaged in the Agreement of 1989 between the World Bank and the Hungarian Government, which secured a foreign currency fund from the so-called Programme for Industrial Restructuring for that purpose. In 1989 a course of training in the appropriate methods was organized for lawyers and economists working in the ministries, but it was discontinued in spring of 1990.

5.4. That short period of deregulation in Hungary terminated on 1 June 1990, when the two government commissioners were relieved of office and the councils of deregulation were abolished.

The reasons for the discontinuance of institutional deregulation were in effect the following:

(a) resistance by the apparatus of public administration, who found it easy to pursue such a course of conduct under the new and inexperienced government, which had a base nowhere but in the Ministry of the Interior to rely upon for reforming public administra-

tion, yet the professional leaders of the Ministry scented some sort of a rivalry in economic deregulation and assisted in rolling it back;

(b) intensification of etatism by the Antall Government claiming to respond to the needs of the transition and the systemic change. In fact, understandably from that point of view, the Government was up to making regulations (rather than engaging in deregulation). Moreover, the earlier deregulation had abrogated numerous laws and regulations which would in effect have been suitable to interfere with economic processes, and indeed it was the Government itself which was annoyed to accept the fact that those tools were no longer at hand (e.g. legality control over enterprises and cooperatives had been transferred from the ministries to the registry courts). This is how the view came to gain currency that deregulation was some sort of "a dirty trick of communism" invented by former communists to undermine the new government.

This is a misconcept, of course, for the socialist State is precisely a "public administrative State" of which the lower-level legal material of public administration (primacy of legislation by decree) is a dominant feature. In a modern bourgeois State governed by the rule of law—particularly in a liberal pro-business one—, legislation should resort to deregulation *ex post* and *ex ante* as an *interdisciplinary technique* without which a modern State cannot function with success. It comes only natural that even massive deregulation has some percentage of error, as hundreds of enactments which it was sound policy to abrogate may happen to include one or two that are proved by later practice to be needed nevertheless. There is a way of subsequent remedy in such cases: the provisions of law involved should be adopted again.

5.5. For this reason I believe that the new government should take the following approach to deregulation.

(a) The institutional obligation to comply with the requirements relative to the objectives of deregulation, in particular to analyze to costs and benefits as well as the ripple effects of legislation, *should be laid down in the Act on Deregulation.* In the case of deregulation *ex ante,* such analysis should be made, and its result evaluated in the general motivation or annex should be presented to parliament, by the Minister submitting bills.

(b) There should be devised a *uniform* (administrative–economic) *organization of deregulation,* which may in theory be attached either to the Government or to the Parliament, with differing advantages and disadvantages.

Attachment to the Government is basically warranted by the fact that most bills will continue to be submitted by the Government and that part of the laws will continue to be followed by government or ministerial decrees on enforcement. In case of subordination to the Government, there are in effect two conceivable arrangements;

(a) deregulation is the responsibility of the Ministry of Justice or the Ministry of the Interior;

(b) implementation of deregulation is organizationally linked to the government office, e.g. in such a way that the organization of deregulation (which would in this case be made up of the Council of Deregulation, consisting mostly of outside experts on the

previous model and of an office unit with a small staff) function under the chairmanship of the Prime Minister's Office.

Variant (b) is better because in the Ministry of Justice or the Ministry of the Interior deregulation would intermingle with different types of tasks and would even give rise to conflicts of interests in certain cases. Under this arrangement, deregulation *would be separated from harmonization of law* (a task to be attended to by the Ministry of European Affairs (or, should it not be established, by the Ministry of Justice).

Subordination to the Parliament, which is recommended mainly by the fact that legislation is based on the active involvement of MPs and parliamentary committees. It is therefore conceivable to form a team of impartial experts independent of party functions, whose professional assistance could be requested by any committee and MP. (The legal section of the Office of Parliament is obviously unable to discharge this task alone.) In this case the organization of deregulation (an office organization of deregulation (an office organization with a small staff and with outside experts) would be attached to the President of the National Assembly and would function in close working relationship with the parliamentary committees concerned. Under this arrangement, deregulation of lower-level administrative norms would be the responsibility of the Ministry of the Interior. (An evident disadvantage of this lies in the organization of deregulation falling apart. Therefore I think that as from 1994 the organization of deregulation should belong the Prime Minister's Office.)

On the other hand, the Government should issue for its organs legal policy guidelines according to which

— laws should be drafted in such a way that, *as a general rule, they may not be followed up with enforcement decrees* and that multi-level or fragmentized enforcement (by government decree + ministerial decree or several ministerial decrees) may only be exceptional. Multi-level legislation should be subject to the consent of the organization of deregulation, disputes to be settled by the Prime Minister;

— the *permissive type of rules* of economic laws—the freedom of economic actors to depart from general rules, or *self-regulation by agreement*—should be extended to as many areas as possible.

The organization of deregulation should revise, not later than March 1995, the laws and regulations passed between 1988 and 1994 and make a proposal for a *comprehensive Act on Deregulation* and, in respect to lower-level regulations, for a *government decree on deregulation.* Also, by making use of international resources available to the Government, it should elaborate a *two-year program* by the end of 1994 for providing training in deregulation for staff members of the organs concerned with preparation of laws and regulations.

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Criminal Jurisdiction and International Crimes

The concept of international crime had lent itself to various interpretations in the course of history, but a fundamental change in interpretation was introduced by the Nuremberg Trial.

The term "crime against the law of nations" is to be found in the Constitution of the United States as well, but related acts are punishable under the municipal criminal law of that country. This term only served to refer to the minimum standards postulated by international law for criminal law: the criminal law of a State was required to provide protection for life, freedom and property. Piracy and war crimes were liable to punishment under customary international law. According to the traditional view, international law granted to States criminal jurisdiction to administer criminal justice under their own municipal law. Since there existed no supranational legislative body, one could not speak but of exercise of a delegated function.[1]

According to the rules evolved by customary international law concerning piracy and war crimes, every State is under an international obligation to punish such acts within its own territorial jurisdiction. The obligation to punish piracy is so strong that failure of a State to fulfil it may even entail forfeiture of its own international personality in an extreme case. Action against piracy is therefore an internationally prescribed rule of municipal criminal law, one emanating, on the one hand, from an interest vested in the freedom of the seas and, on the other, from the interest of every State in assuming

1 SCHWARZENBERGER, G.: The problem of an international criminal law, in: Current Legal Problems, 1950, p. 269.

jurisdiction over pirate ships. The rules of warfare have evolved partly in international treaties, partly in customs, and to observe them is an obligation of every belligerent party. From this it followed that if members of armed forces observing these rules happened to fall into the enemy's hands, they were only liable to treatment as prisoners of war, but were immune from personal responsibility for other hostile acts committed by them. If, however they transgressed the rules of warfare, customary international law authorized the enemy State to punish such individuals as war criminals.[2]

By contrast, a different approach prevailed when States acted under an international treaty rather than customary international law. The slave trade was treated as piracy by bilateral and multilateral treaties. On 8 February 1815 the Congress of Vienna denounced the slave trade as being repugnant to the principles of humanity and universal morality. A multilateral treaty of 20 December 1841 declared the slave trade to be piracy and authorized the contracting parties to detain such vessels and their crews and to apply their own municipal criminal laws of them. That treaty vested the contracting States with an exceptional jurisdiction for the search of suspected ships, but responsibility was governed by the rules of municipal criminal law. The fact that this provision was only applicable to the signatory States is shown by the British view that it would be illegal to authorize the British fleet to capture on the high seas Turkish ships transporting slaves, because the Ottoman Porte was not a party to the treaty.[3]

As seen by Schwarzenberger, the law applied by the Tribunal in the Nuremberg Trial was customary international law with regard to war crimes and a new treaty law with regard to crimes against peace and humanity. It is indisputable that the Occupying Powers had a right to act on the strength of the fact of occupation and that unlimited application of international law against the Germans was ensured by customary international law relating to warfare.

In its Resolution of 11 December 1946 the United Nations General Assembly reaffirmed the principles of international law embodied in the Charter and Judgement of the Nuremberg Tribunal. According to Schwarzenberger, the legal significance of that Resolution can be stated to consist in the future impossibility for the member states of the United Nations to contest that the aforementioned principles formed part of the rules of international law. This means that the exceptional jurisdiction of the belligerent parties over war crimes is to extend in future to crimes against peace and humanity committed in connection with the war.[4] I shall return to the significance of the General Assembly Resolution at a later stage, but the contention that the Nuremberg principles only apply to crimes committed in connection with the war is equally open to question.

The Charter of the International Military Tribunal defined the following acts as constituting crimes against humanity: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the

2 SCHWARZENBERGER, G.: op. cit., p. 270.

3 SCHWARZENBERGER, G.: op. cit., p. 286.

4 SCHWARZENBERGER, G.: op. cit., p. 291.

war (here followed a comma in the English and French texts); or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

A comparison of the English and French texts with the Russian revealed that the former had a semi-colon and the latter a comma. By the Protocol signed in Berlin on 6 October 1945, the English and French texts were amended. The correction had as a consequence that crimes against humanity could only be tried if connected with any crime within the jurisdiction of the Tribunal, i.e. they formed a category of crimes accessory to crimes against peace and war crimes.[5] By contrast, the Encyclopedia of Public International Law refers to the fact that Control Council Law No. 10 of December 1945 deleted the category of accessory crimes from the definition of the crimes in question.[6] As against this, both definitions specified that such acts were punishable regardless of the municipal law of the place of perpetration.

In Jescheck's view, while the United Nations General Assembly Resolution of 11 December 1946 affirmed the Charter and Judgement of the Nuremberg Tribunal, it neither intended nor was in a position to formulate generally applicable rules of international law. Instead it confined itself to rendering a judgement of moral value for world public opinion in this respect. Again, Jescheck pointed out that the concept of international crime was difficult to formulate because the post-World War Two trend introducing the responsibility also of State organs for an international crime had discontinued and that there was no generally accepted criterion for the content of and limit to the concept of international crime. Under the circumstances it appears appropriate to give a conceptual definition as narrow as possible, and even it should establish a connection with the generally recognized basic conceptions of criminal law. For that matter, the term "international crimes" should be replaced with a more precise notion, namely the designation of "crimes against international law". This definition should fulfil at least three conditions. First, the relevant norm of criminal law would have to emanate directly from treaties concluded under international law or from customary international law and to bind individuals without intermediate provisions of municipal law. In this case liability to punishment for certain specified acts could be established without any further need for a relevant penal provision of municipal law. Although in the eyes of Anglo-American lawyers criminal liability may emanate directly from international law, as is indeed reflected in numerous declarations, the continental system of law makes criminal liability conditional on the pre-existence of a provision of municipal law relative to the act involved. Second, international law should determine the organ vested with powers to try punishable acts, i.e. an inter-

5 PARRY and GRANT: Encyclopaedic Dictionary of International Law (Oceana Publications, Inc., New York, London, Rome, 1986), p. 81.

6 Encyclopedia of Public International Law 8, Human Rights and the Individual in International Law. International Economic Relations (North-Holland, Amsterdam, New York, Oxford, 1985), p. 108.

national criminal court or a municipal court acting on the principle of universal jurisdiction, while specifying the mode of prosecution itself. Third, a treaty establishing acts as crimes against international law would have to be adopted by a great majority of States, for that would be the only way of assuring the international status of the relevant penal provision.[7]

O. Triffterer gives Jescheck special credit for having established, after World War Two, the criteria for demarcating criminal international law (*Völkerstrafrecht*) from the fields of criminal law with international implications. He stressed that the demarcating criterion of criminal international law consisted in criminal responsibility emanating directly from international law. Criminal international law should contain norms operating directly, without the agency of municipal criminal law, i.e. without any need for municipal criminal law to establish appropriate statutory penal provision. Criminal international law and criminal law under the law of nations (*Völkerrechtliches Strafrecht*) are synonymous concept and profoundly differ from municipal (state-created) criminal law. In Triffterer's opinion the function of criminal international law is to protect objects that are insufficiently protected by municipal criminal law. In effect, the Nuremberg crimes indicated that each of them had been committed either on behalf of the State or at least with the connivance thereof. This presents a need for a criminal law forming part of international law, one that is doubly subsidiary, partly because the interests of the international community should be protected in this way in cases where means other than those of criminal law are inadequate, partly when municipal criminal laws fail to afford due protection. Although rule of law requires precise formulations of penal provisions, customary law cannot at present be disregarded as a source of criminal international law, and there is no need for recognition by a great majority of States to be used as a criterion of definition.[8]

For his part, Schwarzenberger points out that while the member states lose some of their sovereignty within the frameworks of the United Nations, they do so to no equal measure. The United Nations has powers to use coercive means, but there exist States enjoying a privileged position not only in fact, but also in law. With the right of veto upheld, these States have ensured that nothing but paper swords can be used against them. International criminal law would presuppose an international power above States, since an international criminal code would not be applicable against the Soviet Union or the United States except in war. It will be possible for an international criminal law to be created when the international community has grown strong enough to exercise universal criminal jurisdiction.[9]

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7 Encyclopedia of Public International Law 8, Human Rights and the Individual in International Law. International Economic Relations (North-Holland, Amsterdam, New York, Oxford, 1985), pp. 333–334.

8 TRIFFTERER, O.: Völkerstrafrecht im Wandel? (Festschrift für Hans-Heinrich Jescheck zum 70. Geburtstag, Herausgegeben von Theo Vogler /Zweiter Halband/ Dunker & Humblot, Berlin, 1985), p. 1479.

9 SCHWARZENBERGER, G.: op. cit. p. 295.

The binding force of the Tribunal[10] set up by a resolution of the Security Council can be traced back to the Charter of the United Nations, and the definition of its jurisdiction rules out its actions against the great powers. As can be seen, what was created by the United Nations was not an international criminal court as demanded for decades. Still, the Resolution of the Security Council has a no negligible role in defining the concept of international crime. The Statute of the International Tribunal enumerates in four articles the crimes that are within the Tribunal's jurisdiction.

Article 2 lists grave breaches of the Geneva Convention of 1949, namely acts against persons or property protected under the relevant provision of the Geneva Convention:

(a) wilful killing;

(b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement or a civilian;

(h) taking civilians as hostages.

Article 3 exemplifies cases of violation of the laws or customs of war:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or wilful damage done to, institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Article 4 defines as genocide the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group of another group.

10 Security Council Resolution No. 827 (1993).

Also punishable, in addition to consummated acts of genocide, are conspiracy to commit genocide, attempt to commit genocide, complicity in genocide, and direct and public incitement to commit genocide.

Article 5 defines as crimes agains humanity the following acts when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane act.

The latest draft criminal code of the United Nations, which contains definitions of international crimes other than those committed within a limited time and territory, is not entirely governed by the aforementioned approach. It links crimes to types of perpetrators. Crimes that can be committed by *leading personalities* include aggression, threat of aggression, intervention, colonial domination and apartheid. Defined as crimes that can be committed *by agents or representatives* of a State are recruitment and use of, financial support for, and training of, mercenaries, and international terrorism. Qualified as crimes that can be committed by *any person* are genocide, systematic or mass violations of human rights, exceptionally serious war crimes, illicit traffic in narcotic drugs, and wilful and severe damage to the environment.[11]

From the Code as a whole in general and from the content of Art. 2 in particular[12] it becomes clear that this Code has incorporated international crimes as understood today in the narrow sense. Lying at the basis of this category of crimes are indisputably the Nuremberg crimes, to which were added further crimes in accordance with the criminal policy view prevalent in the International Law Commission at the time of drafting. The Code creates a legal possibility also for state courts to apply it, but, considering the perpetrators of the crimes involved, it will be necessary to wait with its practical application until "a change of régime" or there is an "internal upheaval"[13] allowing the case to be tried by the national court of the offender.

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11 Draft Code of Crimes against the Peace and Security of Mankind (UN General Assembly A/CN. 4/L. 471, 6 July 1992).

12 The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is not punishable under internal law does not affect this characterization.

13 THIAM, D. D.: First Report on the Draft Code of Offences against the Peace and Security of Mankind. UN General Assembly A/CN. 4/364. 29 April 1983, p. 24.

Despite the different wordings, the crimes listed in the Charter of the Nuremberg Tribunal and in the Statute of the International Tribunal, set up by the Security Council, and included in the United Nations draft code should be regarded as *crimes violating international law* and are subject to the statement in the resolution of the XIVth International Congress on Penal Law that individual criminal responsibility flows directly from international law.

In order to make International Criminal Law as effective as possible, international crimes should be divided into two categories, international crimes *stricto sensu* and *largo sensu*.

a) The first category should be defined as follows:

— Such crimes shall be recognized by the international community according to the rules generally accepted for the creation of international law. Accordingly, direct criminal responsibility of individuals is based only on this recognition;

— International crimes *stricto sensu* should be limited to violations of the highest values of the international community.

If these requirements are met, other international crimes of the first category may be recognized in addition to those existing already.

b) The second category (international crimes *largo sensu*) could embrace international crimes which are recognized by rules of the international community not necessarily generally accepted and which deal with violations of values, the protection of which requires the cooperation of the states concerned.

The responsibility for such crimes is based on domestic law.[14]

Customary international law authorizes States, on the basis of the principle of universal criminal jurisdiction, to prosecute certain acts, but when those acts were covered by an international convention, it became a duty of States to institute criminal proceedings. The 1958 and 1982 Conventions on piracy and the Geneva Conventions concerning war crimes may be regarded as cases in point. For that matter, the latter required States to incorporate in their own legal systems appropriate penal sanctions for the punishment of the crimes involved. At the same time, however, they affirmed individual responsibility under international law.

When criminal responsibility under international law is given effect by domestic law, judgements usually rest upon the principle of universal jurisdiction, but they do not, in my view, when the Code of Crimes against the Peace and Security of Mankind is applied. In case of the Code's application by domestic law, proceedings which ensure that domestic courts try also cases of which they would not otherwise take jurisdiction take place under delegated jurisdiction. The European Convention for transfer of criminal procedure may be seen as a model of this.[15]

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14 Internationale Strafrechtsgesellschaft, Kongressakten. XIV. Internationaler Strafrechtskongress, Wien, 1–7. October 1989 (Herausgeber Landesgruppe Österreich der AIDP), p. 331.

15 E. T. S. No. 73.

Concerning the relationship between the Code and domestic law, I should emphasize the following point. On account of domestic law codifying identical or similar facts, international crimes in the narrow sense do not lose their character that individual responsibility flows from international law. Should that be possible, it would be no use distinguishing two categories of international crimes, because responsibility would be based on domestic law in respect to both. This too makes it necessary for crimes *under international law or covered by international treaties* to be distinguished by the use of different terms as well. For codification to make sense in the context of Art. 2 the crimes referred to in the Code should obviously be regarded as crime under international law.

From the foregoing it follows that the United Nations General Assembly resolution of 11 December 1946 and the Conventions refer the crimes under international law are not intended to serve as a subsequent justification for the Nuremberg trials. These international documents function as customary international law for purposes of individual responsibility and, in that status, are examples the relevant articles of the Human Rights Conventions.[16]

Once individual responsibility under international law is accepted, rule of law does not require domestic legislation to apply criminal international law, but exercise of domestic jurisdiction calls for a sovereign State decision as criminal procedure is a manifestation of state sovereignity.[17] The type of act by which the State expresses its sovereign decision is a national constitutional matter. Such act may be taken by Parliament or by the government as liable for prosecution, or even by the judiciary as an independent branch of power. Concerning acts committed during a certain period, this decision of Hungary is embodied in Act XC of 1993, but the contents of the relevant Constitutional Court decision[18] are of general applicability.

Since binding the view that municipal criminal law is a "world criminal code" may be said as dominant and "whoever" used as subject in the criminal provision could be anyone. With a murder or a robbery used as examples, even the object of protection was seen to be of general application in the majority of criminal laws. This led to drawing the conclusion that the provisions concerning the scope of application of a criminal code restrict rather than extend criminal jurisdiction when determining applicability.

In this judgement handed down in the Lotus Case[19] the Permanent Court of International Justice likewise supported this statement by expressing that the criminal juris-

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16 Art. 15, para. (1), of the International Covenant on Civil and Political Rights and Art. 7, para. (1), of the European Convention on Human Rights cover crimes under international law.

17 GRÜTZNER, H.: International Judicial Assistance and Cooperation in Criminal Matters, in: A Treatise in International Criminal Law (M. C. Bassiouni and V. P. Nanda, eds., 1973), V.I., II. p. 180.

18 Decision No. 53/1993. (X. 13.) of the Constitutional Court. Relevant parts of it see Appendix I.

19 In 1927, when it considered the Lotus Case, the Permanent Court of International Justice (PCIJ) stated that customary international law did not require absolute application of the territorial principle in the domain of criminal law. Sovereign States were under no obligation to limit their jurisdiction to acts committed in their own territories and to their own nationals. Furthermore, they were free to exercise jurisdiction over criminal offences committed by aliens abroad. SCHWARZENBERGER, G.: International Law as Applied by International Courts and Tribunals, Volume I, International Judicial Law (Stevens and Sons Limited, London, 1986).

diction of the State was not restricted by international law. Concordant with this was the fact that the following two questions were inseparable as long as the judge applied the domestic law only. One is whether in a particular case municipal criminal law can be applied and the other concerns which provision of municipal criminal law is to be applied. However, these two questions can be kept separate ever since transboundary traffic has increased. First it was to be decided whether domestic criminal jurisdiction could be assumed at all and, for an affirmative answer, it was also to be examined whether the traffic regulations of domestic law or of the law of locus delicti should be applied.

The modern view has fixed the scope of jurisdiction by the protected objects of law. It was commonly known that the State did not in general protect the interests of other States and that, save as expressly so provided for by law, offences committed by or against public officials, financial offences and offences against administration of justice were punishable only if directed against the State's own objects of law. First it was in connection with traffic that it became more common practice for a State to exercise criminal jurisdiction over breaches of administrative regulations of another State as well. Other examples of protecting alien objects of law are the legislative provisions of NATO powers concerning protection of their armed forces stationed in Germany and the EURATOM Agreement, which accords protection to the Organization's secrets in accordance with the rules governing state and official secrets.[20]

According to Cornils, the wording that nothing but German Law shall apply "whatever the place of perpetration" cannot be construed to mean that the foreign legal system prevailing in the place of perpetration would be fully disregarded. The provisions of foreign law are considered in examining the facts of cases connected with preliminary questions of civil or administrative law. In this respects, application of foreign law is in keeping with the principles of both criminal and constitutional law. Application of the normative elements of the provisions varies according as they refer to private law or to public law. It is necessary to consider the conflict rules of private international law in the former case and to respect foreign sovereignty in the latter. In the case of definitions of the offences only indirectly complemented with provisions of the legal system the question of when a foreign law may be applied should always be examined in view of the concrete facts rather than the general rules.[21]

Formerly the administration of criminal justice formed part of jealously guarded state sovereignty, but the changes in modern times have generated a new approach to legal assistance in crimial cases as well. The possibility of rapid and unhampered travel from one country to another has opened room for perpetration of crimes abroad. Such travel facilities have allowed offenders to go abroad after the commission of crimes.

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20 VOGLER, T.: Geltungsanspruch und Geltungsbereich der Strafgesetze, in.: Geburtstaggabe für Heinrich Grützner, zum 65. Geburtstag. (Herausgegeben von Dietrich Oehler und Paul-Günter Pötz. Rv. Decker's Verlag, G. Schenck, Hamburg, 1970), p. 153.

21 CORNILS, K.: Die Fremdrechtsanwendung in Strafrecht (Walter de Gruyter, Berlin, New York), p. 122.

This has been coupled with changes in the purpose of punishment and the task of enforcing punishments. In this respect the focus is now placed on the offender's resocialization, which in turn accentuates the importance of the offender's place of residence rather than to the place of perpetration, for the goal of resocialization can be attained where the offender has intensive contacts, understands local language, and his conditions of life are secured. All these aspects are, as a rule, connected with the place of residence rather than the place of perpetration.

The legal nature of the new institutions is far from clarified. There are those who challenge that transfer of procedure and enforcement could be included in the concept of legal assistance. Since, in point of fact, a State transfers its own functions to another by the transfer of procedure and enforcement, it is more accurate to speak here of cooperation in criminal cases. In support of this view it is argued that a procedure transferred is no special procedure, as legal assistance is generally held to be, but that judgement is passed under an ordinary, or regular procedure.[22]

Transfer of enforcement of punishment may take place in *exequatur* proceedings, meaning that a foreign judgement is made enforceable by a decision based on domestic law. While the principle of judicial independence must also prevail in such proceedings, an *exequatur* decision is virtually two-faced. Internationally it is a form of legal assistance intended to facilitate the enforcement of a foreign judgement, but domestically it is a measure deprivative of liberty in relation to which the court would have undertake responsibility because, in accordance with the principles governing a constitutional state, deprivation of liberty may not be based except on court order. On the basis of material evidence concerning culpability, judicial proceedings apply the principle of *in dubio pro reo* as well, whereas the law of legal assistance is governed by the principle of formal evidence, and a foreign judgement cannot be revised in *exequatur* proceedings as regards either the establishment of facts or legal appraisal or basically the imposition of penalty. So there is no question of *révision au fond.* The preconditions of substantiave and constitutional law for meeting out a sentence deprivative of liberty are accordingly absent from *exequatur* proceedings. All this leads Vogler to conclude that, from the point of view of a constitutional state, transfer of enforcement of a foreign judgement is not identical with enforcement of imprisonment under domestic law. Deprivation of liberty on the basis of transfer is imprisonment only in form and is legal assistance in substance, because the *exequatur* procedure is not an act of German criminal justice (*Strafgerichtsbarkeit*). Vogler maintains that the law-maker shut his eyes, out of humanitarian considerations, to possible damage to the principles of a constitutional state. What was built into the law

22 SCHULTZ, H.: Das Ende der Ausliseferung? in: Geburts'aggabe für Heinrich Grützner, zum 65. Geburtstag. (Herausgegeben von Dietrich Oehler und Paul Günter Pötz. Rv. Decker's Verlag, G. Schenck, Hamburg, 1970), p. 141.

of legal assistance was a foreign body traceable to the principle of *volenti non fit injuria.*[23]

I believe that the few conceptions outlined above suffice to prove that in our days one cannot adhere to the view that a decision to exercise criminal jurisdiction is necessarily coincidental with application of domestic criminal law, because consideration should be given to foreign law in this and other cases.[24] Beside crimes under international law, criminal cases with a foreign element (persons, objects of law, etc.) are increasingly frequent, and foreign law may also be applied to them. On the other hand, application of international law is inevitable in the trial of crimes under international law.

Several provisions of international law impose restrictions on the exercise of criminal jurisdiction by States, but also widen its scope in connection with the trial of crimes under international law. It is therefore not accidental that present-day theory mentions international law before domestic law in enumerating the sources of criminal law.[25] The mentioned decision of the Hungarian Constitutional Court[26]—except for the case of statutory limitation—is fully in keeping with this approach.

The view which recognizes the possibility for domestic law to establish independent rules on statutory limitation also in respect of crimes under international law leaves room for States to punish these crimes subject to different periods of limitation. This seems to contradict the concept under which crimes committed in violation of international law should be punishable irrespective of the rules of domestic law.[27] The non-applicability of statutory limitations to such crimes is seen by the Convention as a principle. Therefore I think that the significance of the New York Convention lies mostly in that the States, by signing it, undertook to prosecute the crimes referred to therein, for, in the absence of an obligation under international law, they are free to decide whether to exercise or not their criminal jurisdiction in respect to certain crimes.

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23 VOGLER, T.: Rechtshilfe durch Vollstreckung auslandischer Strafurteile in: Festschrift für H.-H. Jeschek, zum 70. Geburtstag (Herausgegeben von Theo Vogler. Zweiter Halbband. Dunker & Humblot, Berlin, 1985), p. 1383.

24 *Jurisdiction over offences with a foreign element* in: A treatise on international criminal law. Volume II, Jurisdiction and Cooperation (ed. M. Ch. Bassiouni, V. P. Nanda, Charles C. Thomas Publisher, Springfield, Illinois, 1973), pp. 5–64.

25 International law, the United Nations Covenant, the European Convention on Human Rights, and regional agreements are mentioned by Belgian criminal law as sources of law. *Sources of Criminal Law,* in: *International Encyclopaedia of Laws* (Gen. Ed.: R. Blanpain Kluwer. Law and Taxation Publishers, Deventer, Boston, 1993), pp. 59–62.

26 Further details of it in Appendix II.

27 The Preamble to the Convention, which Hungary promulgated by Law-Decree No. 1 of 1971, recognizes that it is necessary and timely "to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application".

Appendix I

IV. Distinctive Features of War Crimes and Crimes against Humanity

1. A war crime and a crime against humanity are ones which were not created by domestic law, but are regarded as such, and their provisions are determined by the community of nations.

In accordance with the development of international law, which has grown into a determinant factor since the time of World War Two, these crimes are not simply acts that are prosecuted by most States under municipal criminal law as well. (Consequently the murder cannot in themselves be declared to constitute a crime agains humanity.) An element of their international status is their standing above national laws, being grounded either in natural law (invocation of their conceptual basis transcending positive law is a guarantee even in international law against eventual arbitrary treaties) or in defence of the "foundation of the international community" or in their threatening mankind, their perpetrators being "enemies of the human race". Thus their importance is too essential for their punishability to be dependent on their recognition by individual States or on the criminal policies of States at any one time.

2. War crimes and crimes against humanity *are prosecuted and punished by the international community, partly through international court, partly through the requirement for States wishing to be members of the international community to undertake* their prosecution.

International criminal jurisdiction was introduced, and the case for it substantiated, by the Nuremberg and Tokyo International Tribunals. Following their track, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide similarly envisaged establishing an international criminal court, which was not set up, however. States undertook in international conventions to punish such crimes. During the past 10 to 15 years the practice of international organs (committees and courts) watching over the implementation of the various comprehensive human rights convention has shown a more marked tendency to censure States failing to meet this obligation in their domestic law. (It is mainly the decisions of the Inter-American Human Rights Court and Committee that bring into clear relief the obligation of States under international law concerning criminal prosecution, which cannot be evaded even by recourse to amnesty.) International administration of justice was again suggested in connection with the Gulf War, and recently the Security Council has set up an international tribunal to punish persons responsible for grave violations of international humanitarian law in the territory of former Yugoslavia since 1991 (Security Council resolutions 808 (1993) and 827 (1993). In resolution 808 the Council requested the Secretary-General to prepare the necessary material for the implementation of the resolution; this consists practically in the Statue of the International Tribunal and its detailed motivation (Report).

The special significance of the Statute and the Report (3 May 1993) is due to the fact that, precisely in view of the postulate of *nullum crimen sine lege*, Arts. 2 to 5 of the Statute detail and embody the substantive rules of international law which "form part of customary international law without any doubt, so the problem does not even arise that numerous but not all States are parties to certain conventions" (para. 34 of the Report). Consequently the applicable law is independent of the domestic law of individual States, and the fact that the Tribunal stands above national courts in the punishment of crimes within its jurisdiction is consistent with this principle. While national courts are encouraged by the Secretary-General's Report to institute proceedings, the Statute provides that the International Tribunal may take jurisdiction of criminal cases in any phase of proceedings. Also, the principle of *ne bis in idem* operates to the extent that an offender internationally punished may not be tried again by a national court, but the reverse is not true inasmuch as the International Tribunal may institute new proceedings if a national court dealt with a crime against humanity as an ordinary offence, or if a national trial was not impartial, independent or fair, or it was held in order to evade international justice (Art. 10).

3. Thus a State prosecuting and punishing war crimes or crimes against humanity *acts on the mandate of the community of nations under the conditions specified by international law.* Occasionally the community of nations even resorts to review by international organs of national practices failing to comply with the requirements of international law.

The criminal jurisdiction of the community of nations is not exercised under the same conditions and within the same limits as that of individual States is, the differences arising from the distinctive feature of the crimes prosecuted by the former, particularly from the dangers posed by them to mankind as a whole, which caused these crimes to be lifted out of national qualification of their status.

4. Prosecution and punishment of war crimes and crimes against humanity under international law are subject to statutory guarantees, for it would be a self-contradiction to protect human rights without them. These guarantees, however, cannot be replaced or substituted for by those of national law.

The guarantees of *nullum crimen sine lege* is conceived of as applying to international rather than to national law. "Customary international law", "the legal principles recognized by civilized nations", "the legal principles recognized by the community of nations" constitute the *lex* which makes the given forms of behaviour subject to prosecution and punishment by the community of nations (through international organizations or States belonging to the community), regardless of whether or not the national law contains similar crimes or individual countries have the appropriate conventions incorporated in their national laws. The gravity of war crimes and crimes against humanity, namely the threat they pose to international peace and security or to mankind itself, is inconsistent with making their punishability dependent on national laws. The fact that the definition of crimes against humanity is independent of national laws was spelled out by Art. 6, para. (1), of the Charter of the Nuremberg International Military Tribunal: the crimes listed therein are regarded as crimes committed against

humanity, "whether or not in violation of the domestic law of the country where perpetrated". This clause is likewise included by the New York Convention of 1968 in the definition of crimes against humanity: ..., "even if such acts do not constitute a violation of the domestic law of the country in which they were committed". Similarly, the Principles of Cooperation (in the prosecution and punishment of war criminals) adopted by the United Nations General Assembly in 1973 provide for the punishment of crimes against humanity, "wherever they are committed". In determining the substantive law applicable by the International Tribunal which was set up for the punishment of crimes committed in violation of international humanitarian law in former Yugoslavia the proposal was explicitly rejected that the Tribunal should also consider domestic laws which have even incorporated customary international humanitarian law, because the rules of international humanitarian law, having undoubtedly grown into customary law, "provide" as such "a sufficient basis for substantiating the object of jurisdiction" (para. 36 of the Report). This too serves to affirm the principle of treating the two legal orders as separate domains.

Article 15, para. (1) of the International Covenant on Civil and Political Rights—which is similar in content to Art. 7, para. (1) of the European Convention on Human Rights—requires the States Parties to strictly observe the principles of *nullum crimen sine lege* and *nulla poena sine lege*. The reference to a criminal offence defined by international law ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed") is considered by literature to apply solety to criminal offences which are undoubtedly punishable under national law or by virtue of ratification or direct application of the Covenant.

As is provided by Art. 15, para. (2) of the Covenant, "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations". [Article 7, para. (2) of the European Convention on Human Rights is similar in content, save for the use of the phrase "civilized nations" instead of "the community of nations".] It is this exception which allows the States Parties to prosecute the *sui generis* crimes under international law as described above even if the provisions and punishability thereof are not a part of domestic law. From this it clearly follows, moreover, that the relevant Conventions allow these acts to be prosecuted and punished under the conditions specified by international law. Therefore, paras. (2) obviously break through the criminal law guarantees of domestic law as required by the Conventions as well, all the more so since Art. 15, para. (2) of the Covenant and Art. 4, para. (2) of the European Convention require strict enforcement of the *nullum crimen* and *nulla poena* guarantees even in time of war and emergency. For States which have incorporated in their domestic law the norms of international law concerning war crimes and crimes against humanity after the commission of these crimes, para. (2) is tantamount, from the point of view of domestic law, to authorizing criminal legislation with retroactive effect. It was for international law, not for domestic law, to declare these acts punishable at the

time when they were committed. [Az Alkotmánybíróság 53/1993 (X.13) AB határozata. Magyar Közlöny (Hungarian law reports) 1993/147. sz. 8795–97 p.]

Appendix II

V. Crimes under international law and the Constitution

1. The provisions of war crimes and crimes against humanity as well the conditions for their punishability are also determined by international law; these crimes are prosecuted and punished by the community of nations either directly or by requiring States to do so. The rules relative to the punishment of war crimes and crimes against humanity are *jus cogens* norms of international law, because these crimes threaten mankind and international coexistence in their foundations. A State refusing to undertake this obligation may not be a member of the international community.

The rules on war crimes and crimes against humanity undoubtedly form part of customary international law and of the general principles recognized by the community of nations, or, in the terminology of the Hungarian Constitution, of "the generally recognized rules of international law". These rules are "accepted" by Hungarian law, as is stated in the first sentence of Art. 7, para. (1) and are therefore part, without transformation or adaptation, of the "obligations under international law", with which domestic law must be in harmony by virtue of the same Art. (second sentence).

The international obligation to punish war crimes and crimes against humanity runs through the entire *jus cogens* material of international law. Consequently it cannot be undertaken by Hungarian law without also accepting the conditions for punishability as determined by international law. Again, should Hungarian law give a different interpretation of any rule relative to war crimes and crimes against humanity and clearly forming part of customary international law, these crimes prosecuted by domestic law would cease to be such under the terms of international law. For that matter, a similar act of the Hungarian State would not affect in the least either the relevant imperative of international law and the obligation of the State or the offenders' responsibility under international criminal law.

2. The provisions of international law concerning war crimes and crimes against humanity disregard the application by domestic laws of the principle of *nullum crimen* in ordering the punishment of these crimes irrespective of whether or not they are punishable under domestic laws. This seems to be a contradiction only if we were to ensure harmony between international and domestic law by adjusting international law to the requirements of domestic law. In this particular case, however, the question is not simply one of municipal criminal law making an exception to the peremptory rule of *nullum crimen sine lege* in respect of war crimes and crimes against humanity. Thus

the question cannot be confined to whether the specific rule on crimes committed in violation of international humanitarian law can be fitted into the framework of Art. 57, para. (4) of the Constitution. The problem of constitutionality has to be formulated and decided by taking into consideration that in this case, by virtue of the express provision of Art. 7, para. (1), certain rules of another legal system, those of international law, are mandatorily applicable at the same time. Application of international law to these crimes is a condition for participation in the community of nations, one that, as can be seen, the Constitution recognizes by express terms, orders its application and the harmonization of domestic law with it, and a different treatment of which by domestic law would not change international obligation and responsibility in the least. An attitude of detachment from international law would be contrary to Art. 7, para. (1) of the Constitution as it would limit the principle of *nullum crimen* to domestic law rather than break it. Within its own system, international law requires that the crimes in question should, at the time when they are committed, be regarded as war crimes or crimes against humanity on the basis of the general principles recognized by the community of nations, i.e. under the rules of what has been termed above as customary international law. In the case of these crimes it is in effect the criminal jurisdiction of the international community that is exercised through that of the Hungarian State under the conditions and with the safeguards specified by the community of nations. The national law is applicable to the extent to which it is explicitly prescribed by international law (as is the case with, for instance, the scale of punishments). The national law cannot be applied against an explicit and *jus cogens* rule of different content laid down in international law.

There may be various ways of bringing domestic law into harmony with international criminal law, and it is possible to establish express rules on the independence of the two legal systems. Such rules were laid down by the Covenant and the European Convention on Human Rights in their respective fields by spelling out that the international obligation to give full effect to the *nullum crimen* rule in domestic law is not broken by applying the rules of international law to war crimes and crimes against humanity, namely that domestic law is no bar to application of those rules. The permissive rules of the European Convention and the Covenant facilitate the incorporation of this international law rule in domestic law, namely the creation of "harmony" as referred to in the Hungarian Constitution. Of course, these instruments can be of help in relation only to international law; the "harmony" of domestic law with it has to be created by that law. In the absence of permissive or interpretational rules similar to those of the aforementioned instruments (those contained in, e.g., the Portuguese Constitution), room for this is left by an interpretation of the Constitution having regard to international law as well. Such interpretation is also a constitutional obligation in accordance with Art. 7.

Pursuing this train of thought, one finds no contradiction between Art. 57, para. (4) and Art. 7, para. (1) of the Constitution, but has to interpret the two articles in relation to each other. The rules of international criminal law concerning war crimes and crimes against humanity are applicable by virtue of Art. 7, para. (1) in addition to Art. 57 guaranteeing strict observance of the *nullum crimen* principle by domestic law.

A distinctive feature of war crimes and crimes against humanity lies in their punishability whether or not they violated the law of the country where they were committed.

Accordingly the question of whether the Geneva Conventions were formally promulgated or the Hungarian State fulfilled its obligation to apply them before the period corresponding to that of the Act's applicability, i.e. before 23 October 1956, is devoid of significance. The offender's responsibility existed regardless of this, and any subsequent domestic legislation may give effect to his responsibility within its original scope.

... and Art. 2 of the Act did not but fall within the wider compass allowed by the binding force of the Decision of the Constitutional Court for the constitutional applicability of the Geneva Conventions, whatever the legislative action that might be taken subsequently.

IV. 4/b. No single instrument determining substantive or procedural international law contains any statutory limitations with respect to the punishability of war crimes and crimes against humanity. After the conclusion of the Nuremberg and Tokyo trials, however, States practically prosecuted war crimes under their domestic law, and, as the periods of limitation as defined by domestic laws were nearing expiration, certain domestic laws either extended the period of limitation or excluded statutory limitations. The purpose of the New York Convention of 1968 was precisely to eliminate uncertainties and eventualities of domestic laws in this respect, and it provided that "no statutory limitation shall apply" to war crimes and crimes against humanity, "irrespective of the date of their commission". The Preamble to the Convention makes it evident that "ordinary crimes" in domestic laws and war crimes or crimes against humanity cannot be treated similarly.

The New York Convention was concluded at a time when the idea of "common", or international prosecution of crimes against humanity was receding. The States Parties to the Convention undertake to ensure that "statutory or other limitations shall not apply to the prosecution and punishment" of the crimes referred to therein "and that, where they exist, such limitations shall be abolished".

In principle, Art. 7, para. (2) of the European Human Rights Convention and Art. 15, para. (2) of the Covenant allow the States Parties not to apply the rules of domestic law on statutory limitation to the crimes determined by the community of nations. In contrast to these permissive provisions, the New York Convention has established an obligation in this respect, and the Convention is explicitly of retroactive effect.

The Convention was practically ratified only by Third-World countries and the former socialist States, but that fact, concomitant as it was of the political situation of the time, did not affect the otherwise topical need to regulate the non-applicability of statutory limitations. The European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes was drawn up by the Council of Europe and opened for signature in 1974. It covers, in addition to crimes against humanity as referred to in the Genocide Convention and to breaches of the law of war as defined by the Geneva Conventions, "any comparable breach" of the law of war, namely it does not extend the scope of crimes against humanity. As a general rule, the

non-applicability of statutory limitations refers to acts to be committed after the entry into force of the Convention in respect to individual States. Its retroactive effect is limited to the expiration of the periods of limitation, namely the European Convention does not but extend those periods. The Convention was ratified solely by the Netherlands (1981), and its only additional signatories were France (1974) and Belgium (1984).

The majority of European States regulated the non-applicability of statutory limitations to war crimes in their respective domestic laws.

V. 3. The international conventions and documents which define war crimes and crimes against humanity and which undoubtedly lay down the generally recognized peremptory rules of international law contain no provisions on statutory limitations. Therefore, those States which prosecute these crimes under customary international law may apply their own domestic law concerning the period of statutory limitation for punishability or punishment and are not required to spell out the non-applicability of statutory limitations to them. The 1968 New York Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the European Convention of 1974 on the same subject-matter cannot be considered to form part of customary international law or to embody generally recognized rules of international law, but the States which ratified either of the two Conventions assumed an obligation under international law to consider the war crimes and crimes against humanity referred to therein as being subject to no period of limitation with retroactive effect.

Hungary promulgated the New York Convention by Act I of 1971, thereby not only undertaking an international obligation concerning the non-applicability of statutory limitations, but also recognizing a wider range of crimes against humanity in international law than is "generally" covered by international law, for the Convention applies even to *apartheid* and to eviction by armed attack or occupation.

In deciding whether in the interpretation of Art. 57, para. (4) of the Constitution the obligation under the Convention should be considered on the same footing with the general rules of international law importance is attached to the fact that the rules on the non-applicability of statutory limitations are closely linked to the nature of war crimes and crimes against humanity and that in this respect one may speak of a process of international legal development marked by a clear trend but yet to reach its final stage. International law itself makes no provision for a period of limitation, and all the New Convention does is make this situation in international law unambiguously clear in its Preamble, while ruling out determination by the domestic laws of the States Parties of any period of limitation. As can be seen, the Convention extends the independence of punishability of domestic laws, a distinctive feature of the rules of international law concerning these crimes, to the period of punishability as well. If it was possible to establish no case of unconstitutionality in respect of the basic question, namely the application of the *sui generis* requirements of international law in parallel with domestic law, then the same reasoning holds for this commitment of similar and only accessory nature. Indeed, in its Decision No. 11/1992 (III. 5), the Constitutional

Court gave a uniform interpretation of all constitutional requirements of criminal responsibility under the domestic law, and it took the same approach with respect to criminal responsibility under international law. [Az Alkotmánybíróság 53/1993 (X. 13) AB határozata. Magyar Közlöny (Hungarian law reports) 1993/147. sz. 8798–8801 p.].

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Air Crew and Space Crew-Comparative Observations de lege ferenda

From April 12, 1961 up to the present 299 persons—nationals of 26 states[1]—participated in manned space flight. This number is relatively not too high but the space activity carried out by nearly 300 astronauts in many aspects yielded results of major importance in space research and peaceful uses of outer space. In the future manned space activity will play a more intensive role in the field of space activities. All the more is the criticism justified that while space conventions contain some sporadical provisions, the legal framework for manned space flight remains unclear in many important aspects[2] and international law has been lagging behind the tendency of internationalization of manned space undertakings.[3]

The principles derived from positive international space law rules give a certain aid for future law-making. These concern the rights and duties—in general: the legal status of astronauts. Sources of de lege ferenda considerations also may be the municipal space laws. In the U.S. legislation the relevant rules of the National Aeronautics and Space Act

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1 In chronological order: USSR (From January 1, 1992 Russia), U.S.A. Czechoslovakia, Poland, G.D.R. (from January 1, 1989 Germany), Bulgaria, Hungary, Vietnam, Cuba, Mongolia, Rumania, France, F.R.G., India, Canada, Saudi Arabia, Holland, Mexico, Syria, Afghanistan, Japan, Great Britain, Austria, Belgium, Switzerland, Italy.

2 Manned Space Flight. Legal Aspects in the Light of Scientific and Technical Development. Ed. by BÜCKSTIEGEL, K. H.: Proceedings of an International Colloquium, Cologne, May 20–22, 1992. (Cologne Proceedings) p. 7.

3 KOLOSSOV, Y. M.: International Regulation of Human Beings' Presence in Outer Space. Cologne Proceedings, p. 37.

(1958) and NASA regulations promulgated in the Code of Federal Regulations (CFR Title 14).[4] Recently the Russian Federation enacted a comprehensive regulation named Law of the Russian Federation of Space Activities (August 20, 1993). The most important undertaking of preparing the codification of the law of manned space flight is at present the Draft for a Convention on Manned Space Flight (hereinafter: Draft). The authors respectively the institutes represented by them. Professors Karl-Heinz Böckstiegel, Vladlen Vereshchetin and Stephen Gorove had the primary objective "to initiate and promote international discussions in appropriate form in the hope that eventually they will lead to negotiations between interested States either in the U.N. Committee on the Peaceful Uses of Outer Space (COPUOS) or elsewhere).[5] This paper attempts to be a modest contribution to the first part of above intentions by some observations concerning the legal notion of space crew.

Manned Space Flight

The Draft (Article 1) defines manned space flight as

> a flight of a space object with person or persons on board from Earth to outer space or in outer space

manned space object as

> a space object on which a person or persons effect a space flight.

Professor S. E. Doyle referring to a current trend in the legal literature supports the use of sexually neutral language in connection with space activities involving men and women equally. A sexually neutral terminology in his opinion even demands a revised title: Convention on Human Flight in Outer Space instead of Manned Space Flight. In the same way Professor S. E. Doyle suggests that the term "manned" be suppressed throughout the Draft in favour of the term "crewed".[6]

For a foreign author it could be pretentious to intervene in a question of English terminology. My modest remark is only that for me the term "manned space flight" never associated the idea of a space undertaking carried out only by men. In a German-speaking area is not meaningless to refer to the difficulty of neutralization of corresponding terms "bemannter Raumflug" "bemanntes Raumobjekt".

The Hungarian term "*emberes űrrepülés*" is in this respect neutral "*ember*" means namely "human being". Otherwise the term "*űrrepülés*" = space flight itself does not meet

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4 NASA-Act see Space Law Basic Legal Documents. Ed. by K.–H. BÖCKSTIEGEL and M. BENKŐ. Vol. 2/1 E. III. 1. C. F. R. see United States Space Law. Ed. by S. GOROVE: National Regulation I. A. 3. Release 85-1. Relevant rules cited by S. E. Doyle: Astronauts and Cosmonauts in International Cooperation: a View of the American Experience. Cologne Proceedings, p. 43–66.

5 BÖCKSTIEGEL, K. H.: op. cit., p. 7.

6 DOYLE, S. E.: op. cit., p. 39.

the scientific requirements. "*Űr*" means emptiness. Though everybody knows that outer space is not empty, this traditional term cannot be extirpated from the language of space sciences.[7]

The same is true for "astronaut". The German "Raumfahrer" or the Russian Cosmonaut" are more precise. Astronauts do not fly to the stars—at least today.

This term, however, has been accepted by the Space Treaty and other space law instruments. For future law-making de lege ferenda I would generally accept it and "manned space flight" for the activity to be regulated.[8]

Back to the definition of manned space flight: the Draft would define "manned space object" and "manned space flight" in their mutual interdependence without stating what is a space object. It would be useful also to add the legal meaning of space object to Article I. Definitions of the Draft. Without attempting to formulate such a definition I refer only to my idea launched 21 years ago at the XVth Colloquium of our Institute in Vienna, namely that it should be based on a functional element, i.e. the activity of the object realized by orbital movement.[9]

Otherwise the Draft provides that "space flight" should extend to the embarkation, launch, in orbit, deorbit, re-entry, landing and disembarkation phases. I share the opinion of Professor S. E. Doyle: the definition should be limited to mean the entire conduct of the flight sequence from launching to landing or "from lift-off" to touch—splash-down" excluding activities on the surface of the Earth prior to and following the conduct of the flight.[10]

"Envoys of Mankind"

Rules of international space law do not differentiate between members of the crew and other persons on board. All participants of the manned space flight are considered as astronauts independently of the circumstance whether they have duties in the technical realization of the space activity or not. Consequently the provisions of the space law treaties and conventions concern every person on board a manned space object. They are all "envoys of mankind". (S. T. Art. V. 1.)

I agree with the majority of authors, representing the view that this principle may be interpreted as a moral qualification of human beings in outer space only. Unfortunately the mankind does not constitute a political unity, it is no subject of international law.

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7 The Hungarian term "*világűr*" (empty space) has belletristic roots. It became general under the influence of the famous drama of Imre *Madách "Tragedy of Man"* (1860).

8 KOLOSSOV, Y. M.: op. cit., p. 39.

9 GÁL, G.: Space Treaty and Space Technology: Questions of Interpretation. In: Proceedings of the Fifteenth Coll. Vienna 1972. p. 105. Idem: Space Law 1969, p. 208. The definition based on Article VIII (jurisdiction) of the S. T. "object launched into outer space" (DIEDERIKS-VERSCHOOR, I. H. Ph.: An Introduction to Space Law. Deventer–Boston 1993, p. 9) may be completed by this element.

10 Op. cit. Cologne Proceedings, p. 62.

Conclusions that this general clause by international agreement transfers rights of envoys under international law to the astronauts would be absurd.

Professor V. Vereshchetin correctly states also that the status of being envoys of mankind in outer space neither causes the recognition of astronauts as subjects of international law or their deprivation of nationality nor acquisition by them of a supranational status.[11] On the other hand the legal rights and obligations laid down in basic space law instruments constitute the materialization of this moral principle.

The main stipulations concerning the legal status of astronauts are:

- they have to render all possible assistance to the astronauts of other States Parties;
- in case of an accident, distress, emergency or unintended landing states shall take all possible steps to rescue them in territory under their jurisdiction or extend assistance in search and rescue operations in any other place;
- they shall be safely and promptly returned;
- any person on the Moon shall be regarded as an astronaut within the meaning of S. T. Art. V and as part of the personnel of a spacecraft within the meaning of the Rescue Agreement;
- states shall adopt all practicable measures to safeguard the life and health of persons on the Moon;
- states shall offer shelter in their stations to persons in distress on the Moon.

According to generally accepted view in respect of these all persons on board in sense of today positive space law should be considered as "astronauts". The Draft in conformity with this interpretation of Art. V of the Space Treaty provides that

> States shall regard any person in outer space as an astronaut within the meaning of Art. VIII of the Outer Space Treaty and as part of the personnel of a space-craft within the meaning of Art. VIII of the Outer Space Treaty and the Rescue Agreement. (Art. 6, para. 6.)

At the present stage of manned space flights I hold attempts to bind this EoM quality on any subjective, therefore questionable conditions to be dangerous.[12]

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11 VERESHCHETIN, V.: Legal Problems of Man's Flights into Outer Space (in Russian). Moscow 1986, p. 7. Cited by Y. M. Kolossov in Cologne Proceedings, p. 41. Prof. Y. M. Kolossov, however, concluded from above clauses that astronauts "enjoy a special legal regime of a most favored human being".

12 LORZA PITT, R.: Commentary in Cologne Proceedings, p. 207. He would confer the privilege of EoM only to astronauts participating in space missions conducted for the good of all mankind. In this respect the definition of E. Kamenetskaya deserves attention "cosmonauts are people who carry out professional space activities in accordance with principles and rules of international space law". "Cosmonaut" ("Astronaut") an attempt of International Legal Definition. Proceedings of the Thirty First Coll. Bangalore 1988, p. 177.

Air crew and space crew

Persons on board in general and crew or operating crew in air law are treated differently. Flying personnel includes anyone "who normally performs his duties during the flight and whose presence on board throughout the flight is essential: the commander, the copilot and flight attendants". (I. H. Ph. Diederiks-Verschoor).[13]

Passengers having concluded an air transport contract have nothing to do with duties and regulations binding only members of the personnel except one element: of the right of the commander to issue orders to them in special situations.

International air law (Chicago Convention and bilateral agreements) contains the strict obligation that every aircraft engaged in international navigation has to carry appropriate licenses for each member of the c r e w. (Ch. C. Art. 29.)

Per analogiam: the 299 astronauts who participated in manned space activity till today—were they all members of space crews?[14]

First of all, the lexical meaning of crew is confined to a restricted circle: "persons who have duties on an aircraft in flight"[15] "the body of persons manning a ship, aircraft etc".[16] Consequently the term would not cover indiscriminately all persons named in international space law instruments

- astronauts
- personnel of a space object
- personnel conducting activities on the Moon
- persons on board of a space object
- persons on the Moon.

Municipal space laws give the impression that this difference between crew members and other persons on board on national administrative level has been already accepted, consequently in future law-making it should be taken into consideration.

In the United States after January 1986 concerning non-NASA astronaut flights NASA declared in statement at 14 CFR V. § 1214. 303:

> All Shuttle flights will be planned with a minimum *NASA crew* of five astronauts (commander, pilot and three mission specialists). When payload or other mission requirements define a need and operational constraints permit, the crew size can be increased to a maximum of seven.
> (4) NASA policy and terminology are revised to recognize two categories of persons other than NASA astronauts, each of which requires separate policy treatment:

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13 DIEDERIKS-VERSCHOOR, I. H. Ph.: An Introduction to Air Law. Antwerp–Boston–London–Frankfurt, 1983, p. 25.

14 In the publicism this term has been accepted generally even after the appearance of "non-pilots" on board.

15 Webster's Ninth New Collegiate Dictionary. Springfield, Massachusetts, 1983, p. 306.

16 The Oxford Reference Dictionary. Oxford, 1986, p. 198.

(i) *Payload specialists,* redefined to refer to persons other than astronauts (commanders, pilots and mission specialists), whose presence is required on board the Space Shuttle to perform specialized functions with respect to operation of one or more payloads or other essential mission activities.
(ii) *Space flight participants,* defined to refer to persons whose presence on board the Space Shuttle is not required for operation of payloads or for other essential mission activities, but is determined by the Administrator of NASA to contribute to other approved NASA objectives, or to be in national interest.

For Space Transport Systems CFR rules make a distinction between the crew and personnel on board. Former consists of the commander, pilot and mission specialist(s), latter refers to astronauts or other persons during any flight phase of an STS flight including any persons performing extravehicular activity associated with the mission. (1214. 701b, f.)

In the Agreement on Space Station Freedom the crew appears as "qualified personnel" provided by the partners to serve on an equitable basis as crew members. (Article 11. 1.)

Finally we refer to a brand-new product of national space law legislation: the Russian Space Act of 1993. This Law on Space Activities clearly differentiate between crew and persons not belonging to it:

> The commander of the crew of a manned space object is responsible for the safety of the crew and other persons participating in the flight. (Article 20-3/1.)

Under Art. I, para. 6 of the Draft

> The term "crew" means persons who effect professional activities during a space flight.

Though the intention of the authors was obviously directed to differentiation, by this definition persons effecting professional activities e.g. as scientists, which have nothing to do with the technical completion of space flight, would belong to the crew.

To my mind the restriction of professional activities to "mission-specific and registered professional activities" (Rafael Lorza Pitt)[17] is not satisfying.

I would prefer a definition of crew only covering persons charged with technical tasks essential for the safe completion of space flight.

Jurisdiction

The Draft confirms that pursuant to Art. VIII of the S. T. the State on whose registry the manned space object or flight element is carried shall retain jurisdiction and control over such object and any persons thereof while in outer space or on a celestial body or anywhere beyond the limits of the jurisdiction of any state.

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17 Cologne Proceedings, p. 206.

As a logical consequence under Art. IV, para. 1

> the preparation of the manned flight, determination of composition and functions of the crew and participation of other persons as well as their rights and obligations fall within the competence of the State exercising jurisdiction and control.

This principle prevails in municipal laws.

The U.S. NASA Act authorized NASA (Section 203) to make promulgate, issue and amend rules and regulations governing the manner of its operations. Under these provisions NASA has established the rules to govern the selection and training and conduct of astronauts.[18]

In the Russian Federation this right is vested in the Russian Space Agency and the Ministry of Defense while rights and duties of the cosmonauts will be fixed in contracts.

> The citizens of the Russian Federation who expressed their wish to participate in space flights and qualify to the established professional and medical requirements are chosen on the basis of competition for training and performing space flight (Art. 20, para. 1).

The order and terms of the competition are determined by above authorities.

The determination of rights and duties of astronauts and rules of conduct during the space flight and their qualification as well sometime will demand unification by international agreement and a kind of international standardization. Law-making in this field will follow common denominators of national rules.

Commander of the manned space object

The parallel between the legal status of the aircraft commander and rights and duties of the commandant of a space object is obvious. To this comparison Professor V. Vereshchetin twenty years after the first manned space flight correctly observed that in view of the extraordinary conditions of cosmic flight the executive power of the commander of a spacecraft cannot be less than that of the commander of an aircraft or ship.[19]

The U.S. Code of Federal Legislation (§ 1214, 702) the Russian Law on Space Activities (Art. 20, para. 3) and the Draft (Art. IV, 2–7) in this respect more or less are based upon generally accepted air law rules. To my mind this circumstance would make international law-making more easy for legal status of the spacecraft commander than any other issues of legal aspects of manned space flight.

The commander of the manned space object is the "brevi manu" executor of jurisdiction of the State of registry on board.

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18 DOYLE, S. E.: op. cit., Cologne Proceedings, pp. 44–45.

19 VERESHCHETIN, V. S.: On the Elaboration of the Law of Manned Space Flights, Proceedings of the twenty-fourth Coll. Rome 1981, p. 145.

His main rights and duties from the sources mentioned above may be summarized: absolute authority to make action necessary to enforce order and discipline, provide for the safety and well-being of all personnel on board, provide for the protection of the space object and any payload. He has the right to use any reasonable means including the use of physical force to achieve this end. He is responsible for the fulfilment of the flight program within the limits of his powers.[20]

U.S. space law and the Draft extend the authority of the commander to all persons participating in the same flight: "whether or not hey are U.S. nationals" and "irrespectively of their nationality". The Russian Space act is more extensive providing that

> the citizens of foreign states undergoing training for a space flight in the Russian Federation or participating in a flight on a board manned space object of the Russian Federation are bound to comply with the legislation of the Russian Federation if otherwise is not provided for by international treaties of the Russian Federation (Art. 20–5).

The authority of the commanders, however, should be different in relation to the crew and all other persons on board. Members of the crew namely contrary to other persons have their duties in the safe completion of the space flight. Directions of the commander to the crew consequently differ from orders rightly given to other persons on board not being involved in the technical performance of the space flight.

Space passengers

Professor V. Kopal in his commentary on Art. VI, para. 6 of the Draft refers to the possibility that still other persons than members of the crew may appear on board the space object, not only members of other crews e.g. rescued astronauts or participants of other missions but also simple passengers who will enjoy the space travel. He puts the question: all this persons should be entitled to be considered as astronauts sharing their special treatment?[21] I would answer, yes they should be—mutatis mutandis...

Today space flight demands special training but no doubt the time will come when space passengers will board a spacecraft without special preparations. Then it will be obvious that law-making should differentiate between the crew ("flying personnel") and other persons: "space passengers" on board a spacecraft. In this respect the realization of the aerospacecraft will be the decisive landmark of a new development in air and space legislation. Coming generations of space lawyers will be faced with this biggest challenge since the first space flight 32 years ago.

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20 See: VIDELA ESCALADA, F. N. V.: Aeronautical Law. Alphen aan den Rijn 1979, p. 199 et seq., MATEESCO MATTE, N.: Treaties on Air-Aeronautical Law. Montreal–Toronto 1981, p. 193, DIEDERIKS-VERSCHORR, I. H. Ph.: op. cit., pp. 22–24.

21 KOPAL, V.: Some Problems Relating to the in-flight Personnel Regime of Manned Space Objects. Cologne Proceedings, p. 88.

Annex I

Astronauts in chronological order—name, country, number of flights

1	Gagarin, J. A.	SU	01	39	Chonin, G. S.	SU	01
2	Titov, G. S.	SU	01	40	Kubassov, V. N.	SU	03
3	Glenn, J. H.	USA	01	41	Filipchenko, A.	SU	02
4	Carpenter, M. S.	USA	01	42	Volkov, V. N.	SU	02
5	Nikolaev, A. G.	SU	02	43	Gorbatko, V. V.	SU	03
6	Popovich, P. R.	SU	02	44	Bean, A. L.	USA	02
7	Schirra, W. M.	USA	02	45	Swigert, J. L.	USA	01
8	Cooper, L. G.	USA	02	46	Haise, F. W.	USA	01
9	Bikovski, V. F.	SU	03	47	Sevastianov, V.	SU	02
10	Tereskova, V. V.	SU	01	48	Shepard, A. B.	USA	01
11	Komarov, V. M.	SU	02	49	Roosa, S. A.	USA	01
12	Feoktistov, K.	SU	01	50	Michell, E. D.	USA	01
13	Yegorov, B. B.	SU	01	51	Rukavishnikov, Ny.	SU	03
14	Beliayev, P. I.	SU	01	52	Dobrovolski, G.	SU	01
15	Leonov, A. A.	SU	02	53	Paoaev, V. I.	SU	01
16	Grissom, V. I.	USA	01	54	Worden, A. M.	USA	01
17	Young, J. M.	USA	06	55	Irwin, J. B.	USA	01
18	McDivitt, J.A.	USA	02	56	Mattingly, T. K.	USA	03
19	White, J. A.	USA	02	57	Duke, C. M.	USA	01
20	Conrad, C.	USA	01	58	Evans, R. E.	USA	01
21	Borman, F.	USA	02	59	Schmitt, H. H.	USA	01
22	Lovell, J. A.	USA	04	60	Kerwin, J. P.	USA	01
23	Stafford, T. P.	USA	04	61	Weitz, P. J.	USA	01
24	Armstrong, N. A.	USA	02	62	Garriott, O. K.	USA	02
25	Scott, D. R.	USA	03	63	Lousma, J. R.	USA	02
26	Cernan, E. A.	USA	03	64	Lazarev, V. G.	SU	01
27	Collins, M.	USA	02	65	Makarov, O. G.	SU	03
28	Gordon, R. F.	USA	02	66	Carr, G. P.	USA	01
29	Aldrin, E. E.	USA	02	67	Gibson, E. G.	USA	01
30	Eisele, D. F.	USA	01	68	Pogue, W. R.	USA	01
31	Cunningham, R. W.	USA	01	69	Klimuk, P. I.	SU	03
32	Geregovoi, G. T.	USA	01	70	Lebedev, V. V.	SU	02
33	Anders, W. A.	USA	01	71	Artjumin, J. P.	SU	01
34	Satalov, V. A.	SU	03	72	Sarafanov, G. V.	SU	01
35	Volinov, B. V.	SU	02	73	Djomin, L. S.	SU	01
36	Yeliseyev, A. S.	SU	03	74	Gubarev, A. A.	SU	02
37	Chrunov, J. V.	SU	01	75	Gretshko, G. M.	SU	03
38	Schweickart, R.	USA	01	76	Brand, V. D.	USA	04

77	Slayton, D. K.	USA	01	120	Fabian, J. M.	USA	01
78	Zholobov, V. M.	SU	01	121	Ride, S. K.	USA	02
79	Aksyonov, V. V.	SU	02	122	Thagard, N. E.	USA	04
80	Zudov, V. D.	SU	01	123	Alexandrov, A. P.	SU	02
81	Rozhdestvenski, V.	SU	01	124	Brandenstein, D. C.	USA	04
82	Glazkov, J. N.	SU	01	125	Bluford, G. S.	USA	04
83	Kovalyonok, V. V.	SU	03	126	Gardner, D. A.	USA	02
84	Rumin, V. V.	SU	03	127	Thornton, W. E.	USA	02
85	Romanenko, J.	SU	05	128	Shaw, B. H.	USA	03
86	Dshanibekov, V.	SU	01	129	Parker, R. A. R.	USA	02
87	Remek, V.	CZ-S	02	130	Lichtenberg, B. K.	USA	02
88	Ivantchenko, A.	SU	02	131	Merbold, U.	FRG	02
89	Hermashevski, M.	PO	01	132	Bigson, R. L.	USA	04
90	Jahn, S.	GDR	01	133	McCandless, B.	USA	02
91	Lianhaov, V. A.	SU	03	134	McNair, R. E.	USA	01
92	Ivanov, G.	BG	01	135	Stewart, R. L.	USA	02
93	Popov, L. I.	SU	03	136	Soplovyov, V. A.	SU	02
94	Farkas, B.	H	01	137	Atjkov, O. J.	SU	01
95	Malishev, J. V.	SU	02	138	Sharma, R.	I	01
96	Pham, Tuan	V	01	139	Scobee, F. R.	USA	01
97	Tamayo, Mendez	CU	01	140	Hart, T. J.	USA	01
98	Kizim, L. V.	SU	03	141	Van Hoften, J.	USA	02
99	Strekalov, G. M.	SU	04	142	Nelson, G. D.	USA	03
100	Savinih, V. P.	SU	03	143	Volk, I. P.	SU	01
101	Gurragtohaa, Zh.	MO	01	144	Coats, M. L.	USA	03
102	Crippen, R. L.	USA	04	145	Resnik, J. A.	USA	01
103	Prunariu, D.	R	01	146	Hawley, S. A.	USA	03
104	Engle, J. H.	USA	02	147	Mullane, R. M.	USA	03
105	Truly, R. H.	USA	02	148	Walker, C. D.	USA	03
106	Fullerton, C. G.	USA	02	149	McBride, J. A.	USA	01
107	Berezovoy, A. N.	SU	01	150	Sullivan, K. D.	USA	03
108	Chretien, J. L.	F	02	151	Leestma, D. C.	USA	03
109	Harsfield, H. W.	USA	03	152	Garneau, M.	CAN	01
110	Serebrov, A. A.	SU	04	153	Scully-Power, P. D.	USA	01
111	Savitskaya, S. J.	SU	02	154	Walker, D. M.	USA	03
112	Overmyer, R. F.	USA	02	155	Fisher, A. L.	USA	01
113	Allen, J. P.	USA	02	156	Shriver, L. J.	USA	03
114	Lenoir, W. B.	USA	01	157	Onizuka, E. S.	USA	01
115	Dobko, K. J.	USA	03	158	Buchli, J. F.	USA	04
116	Musgrave, F. S.	USA	04	159	Payton, G. E.	USA	01
117	Peterson, D. H.	USA	01	160	Williams, D. E.	USA	02
118	Titov, V. B.	SU	02	161	Seddon, R. R.	USA	02
119	Hauck, F. W.	USA	03	162	Hoffman, J. A.	USA	03

163	Griggs, S. D.	USA	01	206	Alexandrov, A.	BG	01
164	Garn, E. J.	USA	01	207	Polyakov, V. I.	SU	01
165	Gregory, F. D.	USA	03	208	Mohmand, A. A.	A	01
166	Lind, D. L.	USA	01	209	Krikalyov, S. K.	SU	02
167	Wang, T. G.	USA	01	210	Gardner, G. S.	USA	02
168	Van Den Berg, L.	USA	01	211	Shepherd, W. M.	USA	03
169	Creighton, J. O.	USA	03	212	Blaha, J. E.	USA	03
170	Lucid, S. W.	USA	03	213	Springer, R. C.	USA	02
171	Nagel, S. R.	USA	04	214	Bagian, J. P.	USA	02
172	Baudry, P.	F	01	215	Lee, M. C.	USA	02
173	Al-Baid, S. S.	SAUD	01	216	Richards, R. N.	USA	03
174	Bridges, R. D.	USA	01	217	Adamson, J. C.	USA	02
175	England, A. W.	USA	01	218	Brown, M. N.	USA	02
176	Henize, K. G.	USA	01	219	McCulley, M. J.	USA	01
177	Acton, E-W.	USA	01	220	Baker, E. S.	USA	02
178	Bartoe, J.-D. F.	USA	01	221	Carter, M. L.	USA	01
179	Covey, R. O.	USA	03	222	Thornton, K. C.	USA	02
180	Lounge, J. M.	USA	03	223	Wetherbee, J. D.	USA	02
181	Fisher, W. F.	USA	01	224	Ivins, M. S.	USA	02
182	Vasyutin, V. V.	SU	01	225	Low, G. D.	USA	03
183	Volkov, A. A.	SU	03	226	Balandin, A. N.	SU	01
184	Grobe, R. J.	USA	04	227	Casper, J. H.	USA	02
185	Hilmers, D. C.	USA	04	228	Thuot, P. J.	USA	02
186	Pailes, W. A.	USA	01	229	Manakov, G. M.	SU	02
187	Dunbar, B. J.	USA	03	230	Cabana, R. D.	USA	02
188	Furrer, R.	FRG	01	231	Melnick, B. E.	USA	02
189	Messerschmid, E.	FRG	01	232	Akers, T. D.	USA	02
190	Ockels, W. J.	NL	01	233	Culbertson, F. L.	USA	02
191	O'Connor, B. D.	USA	02	234	Gemar, C. D.	USA	02
192	Cleave, M. L.	USA	02	235	Meade, C. J.	USA	02
193	Pring, S. C.	USA	01	236	Durrance, S. T.	USA	01
194	Ross, J. L.	USA	04	237	Parise, R. A.	USA	01
195	Neri Vela, R.	MEX	01	238	Afanasyev, V. M.	SU	01
196	Bolden, C. F.	USA	03	239	Akijama, T.	J	01
197	Chang-Diaz, F. R.	USA	03	240	Cameron, K. D.	USA	02
198	Cenker, R. J.	USA	01	241	Godwin, L. M.	USA	01
199	Nelson, W. C.	USA	01	242	Apt, J.	USA	02
200	Laveykin, A. I.	SU	01	243	Hammond, L. B.	USA	01
201	Viktorenko, A. S.	SU	03	244	Harbaugh, G. J.	USA	02
202	Faris, M. A.	SYR	01	245	McMonagle, D. R.	USA	02
203	Manarov, M. H.	SU	02	246	Veach, C. L.	USA	02
204	Levtchenko, A. S.	SU	01	247	Hieb, R. J.	USA	02
205	Solovyov, A. J.	SU	03	248	Arcebarsky, A. P.	SU	01

249 Sharman, H. P.	GB	01	275 Tognini, M.	F	01
250 Guttierez, S. M.	USA	01	276 Allen, A. M.	USA	01
251 Jernigan, T. E.	USA	02	277 Nicollier, C.	S	01
252 Gaffney, F. D.	USA	02	278 Malerba, F.	I	01
253 Huges-Fulford, M.	USA	01	279 Brown, C. L.	USA	01
254 Baker, M. A.	USA	02	280 Davis, N. J.	USA	01
255 Rightler, K. S.	USA	01	281 Jemison, M. C.	USA	01
256 Aubakirov, T.	SU	01	282 Mohri, M.	J	01
257 Viehbock, F.	AU	01	283 Maclean, S. G.	CAN	01
258 Hendricks, T. T.	USA	03	284 Clifford, M.	USA	01
259 Voss, J. S.	USA	03	285 Helms, S. J.	USA	01
260 Runco, M.	USA	02	286 Polishtchuk, A.	RUS	01
261 Hennen, T. J.	USA	01	287 Cockrell, K. D.	USA	01
262 Oswald, S. S.	USA	02	288 Ochoa, E.	USA	01
263 Readdy, W. F.	USA	02	289 Precourt, C. J.	USA	01
264 Bondar, R.	CAN	01	290 Harris, B. A.	USA	01
265 Kaleri, A. J.	RUS	01	291 Walter, U.	FRG	01
266 Flade, K. D.	FRG	01	292 Schlegel, H. W.	FRG	01
267 Duffy, B.	USA	02	293 Sherlock, N. J.	USA	01
268 Foale, C. M.	USA	02	294 Wisoff, F. J. K.	USA	01
269 Frimout, D.	BE	01	295 Cibliyev, V. V.	RUS	01
270 Chilton, K. P.	USA	01	296 Haignere, J. P.	F	01
271 Bowersox, K. D.	USA	01	297 Hewman, J. H.	USA	01
272 Delucas, L. J.	USA	01	298 Bursch, D. W.	USA	01
273 Trinn, E. H.	USA	01	299 Walz, C. E.	USA	01
274 Avdeyev, S. V.	RUS	01			

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The New Act on Hungarian Nationality

The past decade has witnessed the adoption of new nationality laws or a process of new regulations is still continuing in Europe. The changes have affected three typical aspects in Western Europe.

The equality of women in nationality law is spelled out with a long lag behind its constitutional declaration. Marriage with a foreign male has ceased to entail an automatic change in the wife's nationality, women being entitled to retain their original nationality. The formerly exclusive hold of the principle of *ius sanguinis a patre* is yielding to that of *ius sanguinis a matre,* i.e. the child follows the mother's nationality as well.

Another feature of the new regulations is consisted in affording special grounds for facilitated acquisition of nationality by such children of immigrants who were born, or have been educated for a specified period of time, in the host country (Germany, Italy, Belgium).

Finally, the West European countries are changing their approach to dual nationality. After the revision of the Strasbourg Convention of 1963 aimed at reducing cases of plural nationality, national traditions are becoming prevalent in the states members of the Council of Europe, which, having traditionally tolerated dual nationality, are lifting restrictions emanating from the Convention.

However, in some countries like Germany, Austria or Sweden, which have placed restrictions on dual nationality from the beginning of the earliest regulations, no change can be expected to occur in this field.

In Eastern Europe the successor states of the disintegrated aggregates of political entities adopt their own laws on nationality or, as the Baltic countries do, return to their old legislations which were operative up to the 1940s. The new legislations of Eastern

Europe cannot be likened to the general European regulations, for the former have to resolve specific problems. In addition, they design special solutions for certain questions (e.g. "authorization" of dual nationality).

The need for reregulating the Hungarian nationality was formulated in 1989–90.

The European motive forces as outlined above are not a distinctive feature in Hungary, because the equality of women and the principle of *ius sanguinis a matre* were already implemented by Act V of 1957. Hungary was not characterized by an influx of immigrants in the classical sense, for a large number of foreigners taking up their permanent residence here were of Hungarian origin, whereas dual nationality has been traditionally accepted by Hungarian law. The East European problems are not encountered in this country.

Act V of 1957 is apparently based on modern, stable principles. Yet, what has warranted a rethinking of questions relating to Hungarian nationality?

The mentality of Act V of 1957 is unacceptable under the present-day socio-political conditions, when viewed superficially, the norms of the Act governing the grant of nationality are loose and permissive, stipulating no essential conditions. At the time the Act was passed its provisions had to be applied in conjunction with the unpublished rules and the occasionally arbitrary practice concerning emigration and immigration as well.

By the end of the 1980s, with the gradual recognition of human rights, the phantom rules had faded away and nationality proceedings had found themselves in a vacuum, meaning that, in theory, a foreigner was in a position to acquire Hungarian nationality sooner and with greater ease than his immigration was authorized.

A well-defined and culturally appropriate transformation, responsive to the reality and needs of society, of the rules for acquisition of nationality, with their discretionary character preserved, brooked no further delay, while a review of the range of persons enjoying preferential treatment in naturalization was likewise justified.

The mode of and conditions for termination of nationality had to be changed in their entirety in the spirit of the relevant international treaties and the Hungarian Constitution.

Deprivation of nationality, the statutory conditions for which were difficult to grasp and left room for abuse, was an institution of evil memory in the Hungarian nationality law, for it was used in pursuance of covert political and economic goals. Acts XXVII and XXXII of 1990 already contained provisions for terminating the nationality-law consequences of deprivation, and deprivation as a ground for termination of nationality is therefore unknown to the new legislation.

Release from nationality is seen by Act V of 1957 as a favour granted by the State. The introduction by the new Act of renunciation of nationality has radically changed that approach: existing Hungarian nationality and disposition thereof within the frameworks of the law are recognized as a matter of subjective right, and, where the conditions for renunciation are satisfied, there is practically no possibility of rejecting such applications.

The new Act has incorporated the provisions on rehabilitation as contained in the legislative enactments of 1990 and has extended the range of beneficiaries to include persons who were formerly forced to apply for release as well as ethnic Germans who

were expatriated from Hungary between 1945 and 1948 and thereby lost their Hungarian nationality.

In accordance with the principles of modern legislation, the new Act regulates in detail the special nationality proceedings and lays down basic rules for the protection of data and personality rights. Before reviewing the main provisions of the new Act we shall pinpoint the questions that are usually covered by legislative enactments on nationality.

As a rule, the range of persons regarded by a given State as its nationals as well as the principles, conditions and procedural rules governing acquisition and termination of nationality are determined by a nationality law. Given the importance and public-law nature of nationality, the constitutions of several states, including that of Hungary, lay special emphasis on certain basic principles (Art. 69).

The so-called citizenship rights (and duties) associated with nationality are spelled out, not in the Nationality Act, but primarily in the Constitution.

Perhaps it will not be out of place to recall the international treaties that must be observed by Hungary in respect of nationality. We shall not discuss here the peace treaties and the agreements related thereto.

The first such international norm is the New York Convention of 1957 on the Nationality of Married Women, which gives preferential treatment in naturalization to women who are married to nationals of states parties. However, this provision by no means implies an obligation to grant unconditional and immediate naturalization.

On more remark should be made about the Convention in question. When the Convention was adopted, the equality of women in nationality law was far from general. There were states under the laws of which the wife automatically followed the nationality of her husband, namely a foreign woman automatically acquired the nationality of her husband, or if a woman married an alien, she automatically lost her original nationality. Other states regulated the equality of sexes along more modern lines, with account taken of the equality of women, and the fact of marriage did not affect the nationality of spouses. The different regulations by states may have caused women married to aliens to become stateless. Elimination of such cases was the reason for the conclusion of the New York Convention.

Today even the most conservative systems of nationality law in Europe break with regulations of a patriarchal approach, and the Convention of 1957 has receded into the past. We have discussed this question at so great length for the only reason that during the parliamentary debate on the Bill there was tabled a motion to grant women marrying Hungarian nationals special treatment in acquiring Hungarian nationality. Any discriminative treatment of women, albeit positive, would be a step backward even by comparison to Act V of 1957, which accorded such benefit to spouses in general, regardless of sex. However, unconditional and immediate naturalization is in no way justified and is not required even by international instruments.

Another convention to be observed is the Geneva Convention of 1951 relating to the Status of Refugees, which similarly provides for the grant of facilitated naturalization to applicants recognized as refugees.

Our current Constitution, incorporating a provision of the Universal Declaration of Human Rights, prohibits arbitrary deprivation of nationality and of the right to change one's nationality. This rule also figures among the basic principles of the new Act on Nationality.

Separate mention should be made in relevance to nationality of the multilateral Convention on the Rights of the Child, it is a very important aspect concerning the rights of children to a nationality. This right has traditionally prevailed in Hungarian law: if a child does not acquire nationality by descent (*ius sanguinis*), he will become a Hungarian national by reliance on the subsidiary principle of birth in Hungarian territory (*ius soli*). In connection with the rules on oath or affirmation, more will be said of other relevant provisions of the Convention on the Rights of the Child, which was promulgated by Act LXIV of 1991.

With the general questions of theory considered, let us proceed to a detailed discussion of the new Act on Hungarian Nationality, the structure and logic of which differ considerably from those of the three legislative enactments on nationality which obtained in Hungary before.

Given as short the wording of the Act, its discussion by chapters would be unwarranted as the headings refer to different objects of regulation, which are the following: general principles, Hungarian nationals, acquisition of nationality by operation of law, acquisition of nationality by naturalization, termination of nationality, certification of nationality, proceedings, data protection, and final provisions.

1. The act lays down the basic principles of regulation and of the nationality law in general, a method formerly not customary in Hungarian legislation on nationality, but not unknown to foreign legislations. The arrangement of basic principles under a separate heading indicates the importance of the Act and its special object of regulation pertaining the domain of public law. The Act formulates principles declarative of constitutional civic rights related to the nationality law on the one hand and the traditional principles of nationality law which have crystallized by today on the other.

Which are the principles that the law-maker deems it necessary to emphasize in particular?

Without discrimination and from the moment when nationality is acquired, Hungarian nationals have all the rights and duties emanating from nationality. This can be regarded as a traditional principle, for in Hungarian legal history there is only one instance of discrimination, namely in Act L of 1879, which required the lapse of 10 years from naturalization for a naturalized person to become a member of the legislature.

Modern nationality laws apply no such discrimination.

Reference has already been made to the principle prohibitive of arbitrary deprivation of nationality and of the right to change one's nationality.

The following principles are embodied in the substantive-law rules of the Act.

— Unity of the nationality of the family, with respect to the free will of the individual. The Act recognizes the importance of close and lasting family ties by affording facilities for naturalization. This principle is supported by the provision allowing family members to submit joint application for nationality. At the same time the

Act leaves scope for the free will of the person by not requiring him to follow the nationality of the spouse or parent.

— Reduction of cases of statelessness. Ever since this question became a concern of the law both Hungarian and universal nationality laws have sought to prevent the occurrence of statelessness. Although Hungary is not a party to any international treaty governing cases of statelessness, it gave effect to this principle even in its earlier legislation.

— Protection of personal data. Data concerning nationality and shown in related documents enjoy special protection, and the manner and extent of releasing information are strictly defined.

The Act contains the classical principle of regulating nationality and the most important one of law enforcement, namely it has no retroactive effect. It does not affect the existing status, i.e. the possession of nationality acquired or lost under earlier enactments.

2. Of course, there is no change in determining the range of Hungarian nationals. A person who at the effective date of this Act possesses Hungarian nationality acquires it by virtue of this Act, or becomes a Hungarian national through a fact constitutive of Hungarian nationality is considered by the Republic of Hungary as its national. Such a person must be regarded as a Hungarian national until his nationality is terminated under the provisions of this Act.

After determining the range of nationals the Act defines the status of persons holding dual nationality. It does not intend to change the traditional principle of Hungarian nationality permitting Hungarian nationals to acquire the nationality of another State while retaining Hungarian nationality, or it recognizes the possibility and fact of acquiring dual or plural nationality. At the same time, following the international practice, it subjects Hungarian nationals possessing another nationality to Hungarian jurisdiction unless the law contains provisions on the contrary.

3. Under the heading "Acquisition of Nationality by Operation of Law", the Act specifies the cases in which Hungarian nationality is automatically acquired by virtue of law. Acquisition of nationality is linked to birth. As has been noted earlier, it is a fundamental human right of every child to acquire nationality by birth. The foremost regulatory principle of our nationality law governing acquisition of nationality is *ius sanguinis*, by virtue of which the child acquires the nationality of his parent at birth. The fact that acquisition of his nationality is independent of his origin provides protection for the rights of the child. Regardless of whether or not his parent live in marriage, the child may become a Hungarian national after either his mother or his father.

The principle of descent is absolute as being independent of the place of birth. Acquisition of nationality on the strength of a fact of family law is related to birth. What we have here is a child born of a foreign parent with his family status settled after birth; his other parent must be deemed to be a Hungarian national under the provisions of family law in force from time to time. His Hungarian nationality may be acknowledged from his date of birth.

As has already been mentioned among the basic principles, for avoiding statelessness the law relies on the so-called territorial principle (*ius soli*) in the case of children whose

parents are unknown or stateless, namely who cannot acquire nationality on the basis of *ius sanguinis*. Such children become Hungarian nationals by birth in the national territory. Nevertheless, this provision is a presumption (*praesumptio juris*) that can be refuted if the child's parent who was believed stateless proves to possess the nationality of any State.

4. Acquisition of Hungarian nationality by naturalization or renaturalization. On this ground, nationality may be acquired as a result of nationality proceedings instituted on application by a foreign or stateless person (non-national).

Act V of 1957 determined the period of permanent residence in Hungary, along with declaring a state interest involved, as the only condition for naturalization. In formulating the rules of naturalization the new Act makes allowance for the situation created by the processes of migration over recent years, the national interests, the requirement of preserving the prestige of nationality, and the general European practice.

Under the Act, naturalization is subject to the following basic conditions:

— The applicant must have lived in Hungary for at least 8 years before submitting an application for naturalization.

Under the rules on notification of address, a foreigner whose immigration has been authorized or who has a registered address in the country is deemed to be living in Hungary. (In its final provisions the Act defines the term "place of residence".)

The additional and general conditions for naturalization are these:

— The applicant must show his clearance of criminal record under Hungarian law and that he is not subjected to criminal proceedings before Hungarian courts.

— The applicant must also certify that he has a livelihood and a shelter secured in Hungary. Livelihood can be regarded as secured if the applicant derives an income from a legal relationship established for performance of work, draws a pension, or is supported by someone. A secured shelter may be either a dwelling owned or leased (subleased) or lodging in a private home. Enumeration in the Act of facts supporting the existence of these conditions is unnecessary and would of a barring nature.

— Naturalization must not be contrary to the interests of the State. The Minister of Interior is empowered by procedural rules to request the opinion of the police, the aliens' control office and the organs of national security in matters of nationality.

— Examination involving the command of Hungarian language and a basic knowledge of the Constitution required as a condition for naturalization is a new institution of Hungarian law, but is common in international practice. A person wishing to become a national of Hungary can rightly be expected to be in possession of such knowledge. The details of the examination are regulated by the Government Decree enforcing the Act.

Let us now consider the range of persons receiving facilities for naturalization, namely exemptions from the requirement of 8 years of residence in Hungary.

The first group of beneficiaries may apply for naturalization primarily on the basis of close family ties with a Hungarian national. Family ties can be supposed to entail a more thorough knowledge of the country's culture and customs and to facilitate a more intensive integration into society.

The benefit consists in 3 years of residence in Hungary required for submission of an application for naturalization. On this ground, naturalization may be granted to a person

— whose spouse is a Hungarian national and whose marriage has subsisted for at least 3 years or has been terminated by the spouse's death, namely the applicant is a widow or a widower;

— whose minor child is a Hungarian national;

— who is a foreign child adopted by a Hungarian national;

— who is a refugee recognized as such, for whom Hungary has, by signing the Geneva Convention relating to the Status of Refugees, undertaken to facilitate naturalization.

The requirement of 3 years of residence may be waived, on request, in the case of a child adopted by a Hungarian national. This provision of the Act allows the child to have his nationality status settled as soon as possible and to obtain his adopter's nationality, thereby also being assisted in integrating himself into his new family as early as possible.

A similar benefit is enjoyed by a minor who is included in his parents' application for naturalization and who, by reason of this age, cannot satisfy the requirement of 8 or 3 years of residence in Hungary.

A separate group of beneficiaries is that of applicants of Hungarian origin. A person who declares himself to be of Hungarian nationality and has a Hungarian national among his ascendants is deemed by the Act to be of Hungarian origin. During the debate on the Bill there were made sharp remarks about the point of time, perhaps that of King Matthias, to which one may go back in tracing his Hungarian ascendants. There is no need for such exhaustive genealogical research. The legal institution of bourgeois nationality has existed in Hungary since 1880. Act L of 1879, which became operative in that year, and made a clean sweep of nationality, but its details will not be discussed now.

The applicant may certify the Hungarian nationality of his ascendant, but the Interior Ministry's department considering the application and preparing a decision must always check whether the ascendant invoked was really a Hungarian national.

A foreigner of Hungarian origin may apply for naturalization if he has resided in the country for at least one year.

Each of our mentioned nationality laws has afforded special facilities to applicants belonging to the Hungarian nation and obviously attached to it more strongly than aliens. Yet they must satisfy the general conditions for naturalization, including an examination in the fundamentals of the Constitution.

Another new rule of the Act affords exceptional facilities for a foreigner's naturalization involving a special interest of the Republic of Hungary. The requirements concerning 8 years of permanent residence, secured livelihood and accommodation, and an examination in the fundamentals of the Constitution may be waived by virtue of this provision, which is common in international practice, but is in fact of exceptional applicability.

Renaturalization is in effect a special case of naturalization. By it, Hungarian nationality may be acquired by persons who once possessed but have lost his/her Hungarian nationality. The Act makes no distinction as to the period and duration of the applicant for the Hungarian nationality or even the grounds on which his nationality has ceased.

Compared with the provisions concerning rehabilitation, however, the Act lifts out of that category the range of persons whose nationality was terminated by deprivation, release or, if of German origin, relocation to Germany. Thus, in practice, consideration may be given to such grounds for losing one's nationality according to peace treaties, absence, conclusion of marriage, legitimation, and bilateral interstate agreements.

Applicants for renaturalization are also required to show the existence of general conditions for naturalization, except taking a nationality examination.

Applicants have no subjective right to naturalization or renaturalization, the grant or rejection of applications being a discretionary right of the Head of State, who decides within the frameworks of law on a proposal by the Minister of Interior. The nature of this legal institution allows no appeal from decisions.

The Act upholds the institution of oath or affirmation of nationality. A naturalized or renaturalized person must solemnly declare, before the mayor of competence by his place of residence, to be loyal to the Republic of Hungary, promising to observe the Constitution as well as other laws and regulations.

The decision becomes effective upon the oath or affirmation by the applicant. An applicant of full or limited disposing capacity swears an oath or makes an affirmation in person or, if he is incapable of action, a declaration on his behalf is made by his legal representative.

Acquisition of Hungarian nationality by naturalization or renaturalization is certified by a document issued by the President of the Republic and showing the fact and date of oath or affirmation as entered by the mayor of the settlement concerned. It is a traditional rule that a naturalized person who, after the decision of the Head of State, dies before swearing an oath or making an affirmation or is prevented by his condition from making a declaration must be deemed to have acquired Hungarian nationality on the day on which the document was issued.

5. As noted earlier, the new Act has considerably changed the rules for termination of Hungarian nationality, replacing release and deprivation by the legal institutions of renunciation and revocation.

With the statutory conditions prevailing, a Hungarian national living abroad may renounce his nationality. In order to prevent statelessness, the person concerned is required to prove that he holds the nationality of another State or has already applied for it or has a promise of receiving it. An added condition is that the person renouncing his Hungarian nationality must fulfil his obligations towards the Hungarian State, paying his taxes and other public charges, and that the Hungarian State must have no claim against him under criminal law.

Subject to proof of the existence of statutory conditions, renunciation of nationality is a "subjective right", unlike release under Act V of 1957, namely it is not contingent upon the discretion of the decision-making organ, the only administrative task consisting

virtually in verifying the existence of statutory conditions. This new approach is also manifested in the structural pattern of renunciation proceedings. Within a period of 6 months, the Minister of Interior must examine the existence of conditions for renunciation, namely whether the applicant is really a Hungarian national, or he is of Hungarian national but living abroad, and whether the conditions as specified by the Act are present.

If the applicant has satisfied the conditions, the Minister of Interior proposes to the President of the Republic to accept renunciation. Otherwise he takes a decision, contestable before the court, to the effect that the conditions for renunciation have not been met.

Hungarian nationality ceases by renunciation on the day on which the document of acceptance is issued.

The other way of terminating Hungarian nationality is the legal institution of revocation as introduced by the new Act. Act V of 1957 empowered the President of the Republic to deprive a Hungarian national living abroad of his nationality on the ground of disloyalty or commission of a grave crime. That regulation failed to rule out the possibility of arbitrary deprivation in a satisfactory manner.

The new Act has abolished the entire institution of deprivation. At the same time, the special nature of nationality calls for a legal institution which serves to penalize, also in terms of nationality, unlawful acquisition of Hungarian nationality. Hungarian nationality may be revoked in cases where it was acquired in violation of law, e.g. through presentation of false data or concealment of facts or data, i.e. by misleading the authorities. Revocation of nationality does not naturally exclude criminal responsibility for a course conduct serving as a basis for revocation. In addition, the regulation of revocation is apt to have a preventive effect.

As a rule providing a safeguard, the fact invoked as a ground for revocation is established by decision of the Minister of Interior, such decisions being contestable before the court. Thereupon the Minister presents his proposal to the President of the Republic.

The President's decision must be published in *Magyar Közlöny* (Hungarian Gazette), Hungarian nationality is to be ceased on the day of publication.

6. The Act spells out mandatory acceptance by the entire legal system of Hungary of the documents having probative force concerning Hungarian nationality. As a rule, Hungarian nationality may be proved by a valid identity card and a valid Hungarian passport.

Also, in specified cases, the Minister of Interior issues a nationality certificate attesting to possession of Hungarian nationality by the person indicated thereon, to the fact of its loss or termination, or to the fact that the bearer is not a Hungarian national. it is necessary to limit the period of validity of the nationality certificate, which, given the duration of nationality proceedings, is one year.

In addition to natural persons, different Hungarian and foreign authorities—in performing their tasks during proceedings before them—may need to ascertain the nationality status of persons parties to proceedings, to satisfy themselves that the latter are or are not Hungarian nationals, for the personal law of citizens, the jurisdiction of Hungarian or foreign organs, the powers of proceeding authorities depend on the nationality status.

Data concerning the nationality of affected persons are released by the Minister of Interior at official requests as well.

7. The new Act has at last determined the place occupied by nationality proceedings in the legal system, removing them from the scope of the Act on Administrative Procedure and regulating them as separate, *sui generis* proceedings. This is for the following reason.

In its character and in some other aspects, only the issuance of the nationality certificate resembles administrative proceedings. The decision-making power of the President of the Republic in the case of naturalization, renaturalization, renunciation, etc. *a priori* excludes resort to administrative proceedings, whereas the purpose of preparatory procedure is not typically one to settle an administrative matter.

Nationality proceedings are instituted on application by the person concerned or at the request of an authority or other organ.

An application concerning nationality is one for naturalization or renaturalization aimed at acquiring Hungarian nationality, for making a declaration renouncing Hungarian nationality, or for issuing a nationality certificate. A declaration seeking recovery of Hungarian nationality and presented by a person once deprived of or released from Hungarian nationality or relocated to Germany must also be regarded as an application for nationality.

An application for nationality may be submitted in person to the registrar of the mayor's office of the local government competent in the place of residence or, abroad, to the consul of Hungary. Following from the nature of application and from the statutory conditions, applications for naturalization or renaturalization may only be submitted to the registrar of competence by the place of residence in Hungary, while declarations renouncing Hungarian nationality may only be presented to the competent consul of Hungary. Applications for issuing a nationality certificate may be submitted either to the registrar or the consul, depending on the domicile of the person concerned. Specimens of the printed forms to be used for applications concerning nationality are published in the Government Decree enforcing the Act.

The Act specifies the data to be shown in applications, the facts to be proved and the documents to be used in general for that purpose. Since nationality is a legal institution based primarily on lineage, consideration of applications depend on the registration data of the persons concerned and their ascendants. In some cases, certificates may also be required showing one-time domiciles and the length of periods of residence in Hungary.

Applications for naturalization and renaturalization must be accompanied, along with registration certificates, by documents attesting to compliance with statutory conditions, such as certificates showing absence of criminal record, domicile and means of subsistence in Hungary (e.g. good-conduct, employment, pension or similar certificates).

Enclosed with declarations renouncing nationality must be a document certifying foreign nationality or the probability of its acquisition as well as a certificate of the Hungarian state or self-government tax office to the effect that applicants have paid taxes and other public charges. In certain cases it may be necessary for applications for issuing

a nationality certificate to be accompanied by documents attesting to the Hungarian nationality of applicants who emigrated decades before (e.g. old Hungarian passports or certificates, contemporary nationality documents, including of course such documents of ascendants).

Applications must be accompanied by documents of originals or certified or by certified copies thereof and, if issued in foreign language, together with Hungarian translations.

Submission of applications in person is a special aspect of nationality proceedings. Expression of an intention to acquire or to terminate Hungarian nationality may not be entrusted to the legal representative, just as a marriage may not be contracted through a representative. Nevertheless, the notion of submission of applications in person embraces cases in which an applicant living abroad and has his signature verified and his identity certified by the authority empowered thereto in his place of residence and sends his application to the consul of Hungary.

It would be unjust to require persons living at a distance of several hundred or even a thousand kilometres from a Hungarian foreign representation to appear in person.

The situation is different in the case of applicants residing in Hungary, because there is a self-government in every settlement. However, apart from submitting the application and swearing an oath or making an affirmation, there is no bar to a representative participating in proceedings.

An application for nationality by a person having limited or no disposing capacity is submitted by his legal representative. An application for acquiring or terminating nationality is subject to an act of will by the applicant having limited disposing capacity (an added means by which the law-maker gives effect to the provisions of the international Convention on the Rights of the Child).

Under the Act, the consent of the legal representative is insufficient, and the agreement of both parents is required, for presentation of a declaration renouncing Hungarian nationality. Considering the interests of the child, a declaration by the parent exercising parental supervision is subject to the consent of the other parent living separate.

In view of the specific nature of nationality, spouses or parents may, together with their minor children, submit a joint application for naturalization or renaturalization and present a joint declaration renouncing Hungarian nationality.

The procedure for swearing an oath or making an affirmation is regulated by the Act among the procedural questions. In naturalization or renaturalization proceedings the related document is, together with the applicant's registration certificates, transmitted by the Minister of Interior to the local mayor after the President of the Republic has handed down his decision.

Naturalized persons are invited by the mayor to swear an oath or make an affirmation of nationality. The oath must be sworn or the affirmation made within 2 months from service of the summons. The time-limit may be prolonged by the Minister of Interior in justified cases, but the decision loses effect if the naturalized person fails to swear an oath or make an affirmation within one year.

The Act establishes time-limits for actions by the Minister of Interior.

As has been discussed in some detail, the Minister of Interior must take a position within 6 months in matters of renunciation. He must issue nationality certificates and communicate facts at requests by authorities within 3 months.

The time-limit starts running from the date at which the application is received by the Ministry of the Interior, because applications may be submitted, not directly to the proceeding authority, but to the self-government or, abroad, to the foreign representation of Hungary.

Well-founded consideration of applications would be impeded if the period of their transmission from the aforementioned organs to the proceeding authority were to shorten the time-limit fixed for action by the Minister. The time-limit may be prolonged.

At another place the Act provides that the registrar must forward applications for nationality to the Ministry of Interior within 8 days from receipt thereof, while the consul must do so as soon as possible.

8. The Act seeks to comply with the requirements of data protection, which has recently received great emphasis. Nationality documents as well as related registration and other data are afforded the special protection of personality rights. Therefore they may only be inspected by the persons concerned and, after their death, their lineal relatives, as well as by the judicial, prosecuting and national security organs in matters within their competence.

After swearing an oath or making an affirmation of Hungarian nationality, naturalized persons are notified of the acquisition of Hungarian nationality by the registrar of the self-government competent by the place of residence.

Termination of Hungarian nationality is communicated by the Minister of Interior to the registries concerned.

In matters of nationality the Minister of Interior may inspect registration documents, aliens'control and police files, request data from records of citizens' personal data and addresses, and refer applications to the national security organs and the aliens' control office for their views.

Nationality documents must not be discarded, because nationality is "inherited" through generations and data on certain nationality-related facts are not contained in other authentic registers or files.

Following from the principle of descent, the Ministry of Interior relies continuously on documents of older date and takes care of their safekeeping and filing.

9. The provisions of the Acts of 1990 repealing decisions on deprivation of Hungarian nationality are incorporated in the final provisions of the new Act, which allows persons formerly deprived of or forcefully released from Hungarian nationality as well as ethnic Germans relocated to Germany to recover Hungarian nationality through simplified proceedings.

Nationality law is one of the most static branches of the legal system. The long periods of applicability of nationality laws are exemplified by both Hungarian and universal legal history. The new Act on Nationality is the fourth adopted by Hungary to date, and hopefully there will be no exception.

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The Legal Services Act of the Republic of Croatia—a Guarantee of the Advocates' Independence and Autonomy

I. Introduction

The Legal Services Act of the Republic of Croatia (Zakon o odvjetništvu Republike Hrvatske, henceforth referred to as "the Act") came into force on 18 February 1994 (Narodne novine 9/94).[1] The Act regulates the organization and function of legal services as an independent and autonomous institution whereby advocates and authorized to represent natural and legal persons before courts and give them legal assistance in achieving their rights and interests (Art. 1). The provisions of the Act are based on the best solutions from the centuries-long Croatian tradition of law practice,[2] as well as the

1 In Croatian law, the term "legal services" refers to all types of legal work performed by an advocate (odvjetnik) for clients (advocacy in courts and tribunals, giving of legal advice and drafting of legal documents). In Croatian law, the term "advocate" (odvjetnik) is not the same as "lawyer" (pravnik). Namely, all law school graduates acquire the academic title of "pravnik" ("lawyer" in the sense of Bachelor of Laws). Afterwards they can be employed as lawyers in the public service or in industrial and commercial firms where they may only perform legal functions related to the status and activities of such firms. In order that a lawyer becomes an advocate duly admitted to practice and authorized to perform all types of legal services for clients, he has to complete the required period of practical work and pass the prescribed bar examination. Legal services performed by advocates in Croatian law correspond approximately to the functions performed separately by barristers and solicitors in English law, and are similar to those performed by attorneys at law in the American legal system.

2 In Croatian regions the legal profession was first mentioned in the Croatian legal document Vinodolski zakonik (The Code of Vinodol) of 6 January 1288. The Code of Vinodol speaks of the role of advocates who were not communal officials but were chosen by the parties themselves from a number of literate people learned in the law. In 1868, the so-called Advocates' Order (Advocaten Ordnung) was established in Dalmatia (a

solutions established by legislation and practice in the West-European and Middle-European countries. The Act also incorporates some well-established solutions from the former law on legal services (Narodne novine, 53/72, 8/90, and 31/90).[3] The Act also introduces a number of new solutions taking into account necessary changes in the organization of the political, economic and legal system of the Republic of Croatia after its becoming a sovereign state.

Under the Act, citizens and legal persons have at their disposal an independent and autonomous institution of legal services ensuring them legal assistance for a fee, or free of charge in the cases provided by the Act and by-laws of the Bar Association (henceforth the Bar).[4] Such legal services not only protect the rights of citizens and other legal persons but are also a prerequisite for the normal functioning of the courts, government administration and economy of the country, since the institution of legal services constitutes an essential factor of legal security and stability in a democratic society. The new Act means another step forward in the establishment of Croatia as a democratic state based on the rule of law.

In this account, only the most important solutions from the provisions of the Act will be described.

II. Basic principles of the organization and function of legal services

The basic principles of he organization and function of legal services are laid down in accordance with the Constitution of the Republic of Croatia, Art. 27, which defines legal services as an autonomous and independent institution whereby advocates provide legal assistance to citizens. Moreover, the framers of the Constitution have given special significance to the legal profession so that its specific role in the Republic of Croatia is emphasized in a number of other constitutional provisions.[5]

The Act regulates the organization and function of legal services by means of the following principles: advocates' autonomy and independence; advocates' immunity, obligation to form a bar association; monotype and universal provision of legal protection; actual and continuous law practice; professional incompatibility; conscientiousness and professional responsibility; exclusive right to provide legal assistance for a fee; duty of secrecy; free access to information. Only the most important principles will be described here.

Croatian province), whereby legal practice was inroduced as a free profession, and in 1872 the first Bar Association was instituted in Zagreb and Osijek.

3 Before the enactment of the new law, European legal standards were also recognized and applied by Croatian advocates who belonged to one of the few professions able to win and retain independence even in the former political regime.

4 For example, the Bar must secure free legal aid for defensive-war victims and socially endangered people in legal matters in which such persons exercise rights related to their position (Art. 21).

5 Thus, for example, judges of the Constitutional Court and members of the State Tribunal are partly elected from the ranks of distinguished advocates (Constitution of the Republic of Croatia, Arts 121 and 122).

1. Advocates' autonomy and independence

One of the basic rights of every citizen is to consult an autonomous and independent advocate. Citizens and legal persons are entitled to avail themselves of legal services provided by independent advocates whom they choose themselves so that their rights may be protected.[6] Advocates achieve autonomy and independence especially by practising law autonomously and independently, as a free professional activity, and by forming a bar association or law society as an autonomous and independent organization of advocates which lays down its own Articles and other laws and admits or disbars advocates (Art. 2).

2. Advocates' exclusive right to perform legal services for a fee

In order that citizens may obtain legal assistance of high professional quality, the Act states that only advocates may practise law as a profession (Art. 5). At the same time, special laws may provide that other legally-qualified persons also render certain legal services.[7] The basic reasons for the exclusive right of advocates to work in private practice and render legal services for a fee are professional skill and responsibility.

The Act also introduces a new institution: legal services, i.e. legal advice and opinion, offered for a fee by professors of law in Croatian universities. In this way, highly specialized jurists may provide legal services which advocates, because of their regular engagement in representing clients before courts and administrative agencies, do not offer or are not able to perform at the same level of expertise as university professors.

3. Advocates' immunity

An advocate may not be prosecuted for a legal opinion expressed during his performance of legal services in proceedings before courts or administrative agencies (Art. 15). He may not be arrested for an offence committed in performing legal services without a warrant of arrest issued by a panel of three judges of a competent court (Art. 16). A search warrant for the examination of an advocate's office or his person may only be issued by a competent court if all conditions prescribed by the Penal Code of the Republic of Croatia are fulfilled (Art. 17).

The intention of these provisions is not to give advocates special rights but to ensure them freedom and security in performing their professional activitity and protecting their professional secrets. These provisions also protect the rights of their clients. However, the immunity of advocates is narrower than judicial immunity. Thus immunity does not

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6 In this sense, the principle of advocates' independence and autonomy is laid down in the provisions of the Constitution of the Republic of Croatia relating to the basic freedoms and rights of man and citizen, which shows the commitment of Croatia to democracy and the rule of law.

7 E.g. the Notarial Services Act (Zakon o javnom bilježništvu, Narodne novine, 78/93) regulates the organization of work and powers of notaries public. A notary public performs his work as an exclusive profession and, among other things, is also authorized to draw up certain official documents concerning legal transactions, statements and facts on which legal rights are based (Art. 2). He is also authorized to represent clients before court in non-litigious matters when such matters are in direct connection with a document he has issued, in which case he has power of attorney involving the rights and duties of an advocate.

exempt an advocate from punishment for having insulted a judge or another person involved in legal proceedings or for other misbehaviour (e.g. obstruction of proceedings) in court or during any other proceedings.

III. Remuneration and reimbursement of expenses

Advocates are entitled to remuneration for their work and to reimbursement of expenses incurred by their work according to the fee rates established by the Bar (Art. 18). The determination of fees by the Bar is an essential element of the advocates' autonomy.[8] However, this also means that an advocate may not charge a fee without any criteria or entirely of his own accord.

A new solution consists in the possibility to negotiate remuneration in proportion to the success of legal services rendered in property disputes (pactum de quota litis), which used to be forbidden. The upper limit of remuneration in terms of a negotiable percentage is determined by the Bar (Art. 19). The aim of these provisions is to motivate advocates to negotiate out-of-court settlements of disputes so that courts may be less burdened with cases and parties achieve their rights in a shorter time.

IV. Advocates' offices and law firms

With respect to the organization of legal services, the Act introduces some essential novelties. An advocate may freely choose or change the residence of his office in the territory of Croatia. An advocate may only have one office, but several advocates may have a joint practice which is established by registration in a special register of the Bar (Art. 25).

Two or more advocates may found a law firm which has the status of a legal person and is instituted as a partnership (Art. 27). Only advocates may be members of a law firm, and only advocates and articled clerks may provide legal services in such firms. In order to establish a law firm, its founders (advocates) must first receive approval from the Bar. The aim of such solutions is to adjust the organization of legal services in Croatia to contemporary trends in the organization of legal services abroad. The establishment of larger law firms will facilitate relations with foreign law firms,[9] and increase the quality of work, possibility of specialization, use of computers, etc.

A joint practice or a law firm my have several offices on condition that in each office at least one advocate works permanently (Art. 22).

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8 Exceptionally, the fee for the advocvate's work in ex officio defences is fixed by the Ministry of Justice (Art. 18, para. 2).

9 A Croatian and a foreign law firm may link up by a written agreement for the purposes of legal work of mutual interest, mutual assistance, etc. The mode and conditions of such cooperation are regulated by the Articles of the Bar.

An advocate can submit a request to practise as a specialist in a branch of law, and at their registration law firms can confine themselves to legal services in a specific branch of law (Arts 69 and 70). Requests for approval of specialization are dealt with by a competent board of the Bar, and the branches in which advocates may be admitted to specialize are defined in the Articles of the Bar. When the approval is given, the specialization is entered in the advocates' directory and may be advertised in the name of the office or the relevant law firm.

V. Obligation to form a bar association

The Bar is an autonomous and independent organization with the status of a legal person. The Bar represents the advocates of the Republic of Croatia as a whole (Art. 37). Its bodies are the following: Assembly, Board of Directors, Executive Board, President and other bodies specified in its Articles. The Assembly lays down the Articles of the Bar and the Code of Legal Ethics (the Act, Arts 41 and 42). The Bar keeps a directory of advocates and articled clerks and a register of joint practices and law firms and other records prescribed by the Act or its Articles.

The regulation of the advocates' organization is based on two essential postulates: obligation to form a bar association and full autonomy of the advocates' organization and activities. Every advocate is required to become a member of the Bar (Art. 37). In order to maintain high standards of legal services, every advocate is subject to control by the Bar as an autonomous and independent professional organization, and not by any government bodies or other national authorities.

VI. Professional liability insurance

Special importance is attributed to the provisions of the Act that introduce obligatory professional liability insurance which pays compensation if an advocate incurs damage to a third party by performing legal services (Art. 44). This institution protects advocates against any of the risks or faults in their conduct or performance in legal services. On the other hand, the parties concerned are given a guarantee that they will receive indemnity for any damage incurred by negligent or improper behaviour of advocates. The Bar can underwrite liability insurance of all advocates in the Republic of Croatia. In that case, every advocate is bound to pay an insurance premium to the Bar.

VII. Admission and disbarment of advocates

The Act regulates the basic questions relating to the admission and disbarment of advocates. In this matter, the Act mainly incorporates relevant solutions from the former law on legal services that are well-established in practice. However, the fundamental changes in the organization of the political, legal and economic system of the Republic of Croatia after its becoming a sovereign state, as well as a considerable increase in the

number of advocates and a relative decrease in the quality of legal services,[10] resulted in stricter requirements for the admission of advocates. Also, the possibility that a lawyer enrolled in the bar of another state acts as an advocate in the Republic of Croatia is restricted to proceedings before arbitration tribunals in legal matters with a foreign element (Art. 47).

The right to practise law in the Republic of Croatia is achieved by registration in the advocates' directory after an oath-taking ceremony. The right of registration may be granted to a person who: is a Croatian citizen; possesses legal capacity; is physically and mentally fit to work as an advocate, has graduated from a law school in the Republic of Croatia, has at least three years' experience of legal work in an advocate's office or in a court, or five years' experience in other legal work; is a fluent speaker of Croatian; has passed the bar examination in the Republic of Croatia; is not under criminal investigation or charged with an offence by a public prosecutor; is not engaged in any activity incompatible with law practice (Art. 48). All the requirements must be fulfilled cumulatively. An advocate is disbarred if he or she has lost Croatian citizenship; has lost legal capacity; has become permanently unfit for practice; has received a suspended sentence prohibiting him or her from practicing as an advocate; has been suspended from practice as a result of a disciplinary measure; gives up working as an advocate; does not actually practise as an advocate for more than six months without good reason; gets employed (elsewhere than in an advocate's practice or in a law firm); is sentenced to a term of imprisonment of more than six months (Art. 56).

VIII. Instead of a conclusion

The Articles and other by-laws of the Bar must be brought into conformity with the Act within a year from its effective date. With this Act coming into force, the former law on legal services (Narodne novine 53/72, 8/90 and 31/90) has ceased to be operative.

10 One of the aims of the Act is to prevent unlincensed law practice (or quack practice), a phenomenon regarded as dangerous and detrimental to any legal system. In principle, only advocates are allowed to practise law professionally, and the Bar is empowered and obligated to initiate proceedings in the cases of unauthorized performance of legal services (Art. 6). Any performance of legal services contrary to the provisions of the Act is punishable by pecuniary penalties which may be inflicted on either a natural or a legal person, and in recurrent cases the operating licence granted to a legal may be cancelled temporarily or permanently.

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KALEIDOSCOPE

A Note on the Hungarian Acceptance of the Optional Clause

1. The relations of the former socialist States to International Court of Justice were not very friendly. In forty-five years the Central and Eastern European States with some exceptions always refused to appear before the Court either as applicant or as respondent[1] and until the end of 1992 not a single case were submitted to the Court by those States. The same applies to the advisory proceedings and the Central and Eastern European States tried to hinder the Court to respond to the requests of advisory opinions in almost all cases in which they were touched upon.[2]

Hence the Central and Eastern European ('Socialist') States did not accept the Optional Clause of the Statute of the World Court and as a rule they made reservations to multilateral treaty provisions containing a clouse concerning the jurisdiction of the Court for certain disputes between the contracting parties.[3] As a result of the political changes in the region entailing an emphatic commitment to the rule of law in general and in international relations in particular, the Central and Eastern European States necessarily changed step by step their attitude toward the Court; as a first move they

1 The East European ('socialist') States were involved in the contentious cases of the Corfu Channel, the Monetary Gold Removed from Rome in 1943, the Aerial Incident of 27 July 1955.

2 See Conditions of Admission of a State to Membership in the United Nations; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania; Mazilu case, etc.

3 Only very few multilateral treaties were exception to this practice. Sometimes the reservations of the East European States were formulated in such a way that the consent of the parties to the dispute were required for each dispute separately to the jurisdiction of the Court, and as a result instead of the acceptance of a compromissory treaty provision the State just repeated the very well known principle that without the consent of the parties to the dispute the Court could not consider a conflict.

revoked their reservations to judicial clauses found in multilateral treaties and than even some Central and Eastern European States made unilateral declaration accepting the Optional Clause.

2. Article 36 of the Statute of the International Court of Justice, the so-called Optional Clause, provided for the introduction of a particular system of compulsory international jurisdiction on a strictly voluntary basis. Under this system the States could, by making unilateral declarations of acceptance, recognize as compulsory, in relation to States accepting the same obligation, the jurisdiction of the Court.

Since in the Statute of the Permanent Court there were no provisions on the form of the declarations, States developed in practice several forms and the acceptance of the Optional Clause was admitted in any form.[4] A few States just repeated the words of the Optional Clause, while the declarations of others widely differed from the Statute in their text. In certain other cases the States concerned announced simply, in a single sentence, that they recognized the compulsory jurisdiction of the Court. Some States included such declarations in their instruments of ratification of the Protocol of Signature of the Statute of the Court, others in turn sent an Optional Clause declaration by letter to the Secretary-General of the League. After the Second World War the situation was similar since the Statute of the new Court is almost literally identical with the Statute of its predecessor, and thus no change has been made regarding to the declarations.[5]

As to the content of the declarations the States are free to formulate their declarations of acceptance of the compulsory jurisdiction. The more than seventy-year history of the Optional Clause shows that some States with the reservations added to their declarations limited very much the scope of compulsory jurisdiction of the two Courts, especially if take into consideration the principle of reciprocity which applies *ex lege,* owing to the Statute, to the system of the Optional Clause irrespective whether the States are mentioning, or not the reciprocity in their declaration. The States making declarations under the Optional Clause are not bound by any rule, they have full discretion to decide what obligations to assume by their declarations, as well as for what disputes, in relation to which States, and for what period of time.

The reservations or limitations appended to declarations under the Optional Clause, which effectively restrict the compulsory jurisdiction of the Court, are usually divided

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4 Cf. FARMANFARMA, A. N.: The Declared Jurisdiction of the International Court of Justice. Montreux, 1952. 25–26.

5 Paragraphs 2 and 3 of Article 36 of the Statute of the International Court of Justice reads as follow:

"2. The States parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time."

into three groups, differentiating between limitations *ratione temporis, ratione personae,* and *ratione materiae.*[6]

In the last more than seven decades the States in their declarations accepting the compulsory jurisdiction of the two Courts have developed many and rather complicated reservations which incontestably weaken the effect of the declarations. In scientific literature the debates about the admissibility of reservations to declarations accepting compulsory jurisdiction were rather academic character, especially because the States did not object to any reservation and the two Courts themselves, when receiving notification of some rather "disputable" reservation, simply took note of it. As Sir Humphrey Waldock pointed out in this connection "...it was a recognized interpretation of the Statute that States had an inherent right to qualify their acceptance of the Court's jurisdiction under the Optional Clause by limitations, reservations, and conditions".[7]

3. At the time of the Permanent Court of International Justice the majority of Central and Central and Eastern European States accepted the compulsory jurisdiction of the Court and at the eve of the Second World War Albania, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Yugoslavia were parties to the system of the optional clause.[8] However, these declarations either expired, or owing to the dissolution of the Permanent Court lapsed,[9] or the declaring State itself disappeared like the Baltic States. Till the end of the '80s the Central and Eastern European States were out of the system of the Optional Clause. After the democratic changes in the region Poland was the first in accepting the Optional Clause at 25 September, 1990. This were followed by Estonia (21 October, 1991), Bulgaria (24 June, 1992)[10] and Hungary on 22 October, 1992.

It should be mentioned that the first Hungarian declaration accepting the Optional Clause dated from 14 September, 1928, in that declaration Hungary accepted the compulsory jurisdiction of the Permanent Court practically without reservation, it did not exclude any category of dispute, and even did not rule out the retroactive effect of the declaration, since it did not mentioned that the declaration concerns only disputes arising in the future, or with regard to situations or facts subsequent to the ratification of the declaration. That declaration contained only two restrictions, namely it was made on condition of reciprocity, and for a period of 5 years from the date of the deposit of the instrument of ratification. The condition of reciprocity, as we already mentioned, was not a real restriction since the principle of reciprocity according to the Statute was inherent to the system of compulsory jurisdiction under the Optional Clause, and this principle applied to all declarations irrespective whether it was included, or not in the declarations. The declaration of 1928 was renewed twice, first for another period of 5 years as from

6 Cf. MERRILLS, J. G.: The Optional Clause Today. in: BYIL 1979, 96–110.

7 WALDOCK, C. H. M.: Decline of the Optional Clause. in: BYIL 1955-56. 248–249.

8 See PCIJ Series E. No. 16. Sixteenth Report of the PCIJ (June 15th, 1939—December 31st, 1945). 331–361.

9 See the case of the Bulgarian declaration of 1921 in the Case concerning the Aerial Incident of July 27th, 1955.

10 Cf. ICJ Yearbook 1991–1992. 76–77, 82, 101–102.

13 August, 1934, and than for the period from 13 August, 1939 to 10 April, 1941. This second renewal was made already at the time of the Second World War, and this is the reason why this declaration, according to our knowledge, contained the shortest time limitation in a declaration of acceptance ever made by a State.

4. On 22 October, 1992, after more than a semi-centennial interruption the Hungarian Government by a letter to the Secretary-General of the UN joined to the system of compulsory jurisdiction of the World Court. The decision on the acceptance of the Optional Clause was adopted by the National Assembly practically unanimously.[11]

The Hungarian declaration was made on condition of reciprocity with respect of all disputes arising in the future in respect of facts or situations subsequent of the declaration of accepting the compulsory jurisdiction of the Court.

The Hungarian declaration contains several reservations restricting to a certain extent the scope of the obligations assumed by Hungary under the optional clause:

a) The first reservation excludes from the application of the declaration those disputes in regard to which the parties agreed to recourse to some other method of peaceful settlement. It is well known that the reservations relating to other methods of pacific settlement are one of the most frequently used reservation and correspond to Article 95 of the Charter which provides that nothing in the Charter "shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future". The reservation concerning other peaceful method of peaceful settlement gives a freedom of action to the State by securing that according to its wish certain disputes covered by the declaration should not be submitted to the Court.

b) As regards the time-limit of the Hungarian declaration like the majority of the post-war declarations contains a provision concerning termination or denunciation. The declaration itself do not comprise any reference to duration, i.e. the Hungarian Government accepted the compulsory jurisdiction of the Court for an indefinite period, and practically it reserves the right of termination of the declaration at any time. However, what is very important, according to the declaration the termination will take effect only after six months of notice period.

The Hungarian Government as many States accepting the compulsory jurisdiction of the Court reserved also the right at any time to amend, or withdraw any of the reservations its declaration or to add to it any other reservations, and again any of such modification of the declaration will take effect after six months of the notification.

c) One of the most debated and most important type of reservation to the declarations of acceptance are the reservations relating to matters of domestic jurisdiction. That reservations are in line with Article 2, para. 7 of the Charter stating that nothing in the Charter "shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State". The reservations concerning domestic jurisdiction date back to the interwar period when in 1929 Great Britain introduced in its

11 Resolution of the Parliament 56/1992 of 2 October, 1992.

declaration a reservation concerning domestic jurisdiction. This type of reservations was subject of criticism by Hersch Lauterpacht already in the late '20s.[12] However, later on the reservations concerning domestic jurisdiction become "popular" and in the practice of States two kinds of reservations concerning domestic jurisdiction were developed. The first one we call "objective" reservation to domestic jurisdiction, which means that the declaring State excludes matters falling within domestic jurisdiction as determined by international law. The other version is the so-called "subjective" reservation concerning matters of domestic jurisdiction, the famous Connally-reservation, which excludes from the recognition of the compulsory jurisdiction of the Court questions falling essentially within the domestic jurisdiction as "determined" by the State concerned or which such State "considers" essentially within its domestic jurisdiction. The Court faced with the problem of subjective reservations to domestic jurisdiction in Certain Norwegian Loans and Interhandel cases. Sir Hersch Lauterpacht judge of the Court in his separate opinion delivered in the Case of Certain Norwegian Loans challenged such reservations and declared them null and void.[13] The Court itself never dwelt on these reservations and as it stated in the Case of Certain Norwegian Loans: "...the Court has before it a provision which both Parties to the dispute regard as constituting an expression of their common will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it."[14]

Taking into consideration the destructive effect on the system of compulsory jurisdiction the Hungarian declaration refers to the objective reservation to domestic jurisdiction and excludes from the recognition of the compulsory jurisdiction of the Court disputes in regard to matters which by international law fall exclusively within the domestic jurisdiction of Hungary.

d) The Hungarian declaration added a special and rather complicated reservation concerning hostilities, war etc. The reservations concerning armed actions first appeared at the eve of the Second World War when the member States of the British Commonwealth and France added new reservations to their declarations of acceptance and excluded disputes arising out of events occurring at any time when the declaring States were involved in hostilities.[15] After the Second World War the reservations on armed actions and hostilities become more complicated and nowadays some States shaped in such a way that they cover even the event due to the participation in UN peacekeeping actions.

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12 Cf. LAUTERPACHT, H.: The British Reservation to the Optional Clause. in: Economica, 1930. 148–149.

13 Cf. ICJ Reports, 1957. 34–66.

14 ICJ Reports, 1957. 27.

15 At that time some member States of the League made "reservations" regarding these declarations or above-mentioned limitations. Cf. PCIJ Series E. No. 16. Sixteenth Report of the PCIJ (June 15th, 1939–December 31st, 1945) 333.

The inclusion of a reservation concerning events of armed actions was important for Hungary in view of the fact that several questions connected with the Second World War and the Revolution of 1956 were still pending.

e) With the forth reservation of the declaration Hungary wanted to avoid to be suited by a State which accepted the compulsory jurisdiction of the Court with immediate effect and with the aim to bring a given dispute before the Court. As it is well known since the Case concerning the Right of Passage over Indian Territory the States are cautious and they try to avoid any "surprise" action by a State which very shortly after adhering to the system of compulsory jurisdiction of the Court introduces a proceeding against an other State accepting the Optional Clause. The States consider such "surprise" action as a danger especially because the Court upheld these actions by stating that "A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposited with the Secretary-General its Declaration of Acceptance."[16]

As a conclusion it should welcome that after so many years Hungary made a declaration accepting the compulsory jurisdiction of the World Court. One can state that the reservations included in the declaration do not undermine the obligation assumed by adhering to the system of the Optional Clause.

ANNEX

The Text of the Hungarian Declaration of 1992 Accepting the Optional Clause

"The Republic of Hungary hereby recognizes as compulsory *ipso facto* and without special agreement, on condition of reciprocity, the jurisdiction of the International Court of Justice, in accordance with Article 36, para. 2, of the Statute of the Court in all disputes which may arise in respect of facts or situations subsequent to this declaration, other than:

a) disputes in regard to which the parties to the dispute have agreed or shall agree to have recourse to some other method of peaceful settlement;

b) disputes in regard to matters which by international law fall exclusively within the domestic jurisdiction of the Republic of Hungary;

c) disputes relating to, or connected with, facts or situations of hostilities, war, armed conflicts, individual or collective actions taken in self-defense or the discharge of any functions pursuant to any resolution or recommendation of the United Nations, and other similar or related acts, measures or situations in which the Republic of Hungary is, has been or may in the future be involved;

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16 ICJ Reports, 1957. 146.

d) disputes in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than twelve months prior to the filing of the application bringing the dispute before the Court.

The Government of the Republic of Hungary reserves the right at any time, by means of a notification addressed to the Secretary-General of the United Nations, and with effect of six months of such notification to amend, add to or withdraw any of the foregoing reservations or any that may hereafter be added.

This declaration shall remain in force until the expiration of six months after notification has been given of its termination."

Vanda LAMM

The State Council on the Judiciary of the Republic of Croatia

I. Introductory Note

The Republic of Croatia Parliament—its House of Representatives—during the June 2nd 1993 session enacted "*Zakon o Drzavnom Sudbenom Vijecu*" [The Act on the State Council on the Judiciary] (Official Gazette: *Narodne Novine No. 58/93*). The Act came into effect as on June 26th 1993. It regulates the eligibility criteria for the president and the members of the State Council on the Judiciary (hereinafter: S. C.) and cessation of their office. In addition it also sets the procedure of appointing/discharging of the judges and state attorneys as well as their disciplinary responsibility procedure. Such an Act is important because it establishes the self-directing and independence of the judiciary, that being an indispensable prerequisite to develop a rule-of-law-state.

II. The Situation Preceding the Enactment and Constitutional Grounds to Enact

Prior to enacting and/or application of The Act on the State Council on Judiciary (hereinafter: S. C. A.), the judges of the regular courts, public prosecutor of the Republic and his deputies, public attorney of the Republic and his deputies were appointed/dis-

charged as regulated by the Act on Regular Courts,[1] Act on Public Prosecutor[2] and Act on Public Attorney of the Republic of Croatia. Under the provisions of the quoted Acts the judges, public prosecutor and his deputies, public attorney and his deputies were elected, appointed and discharged by the Parliament of the Republic of Croatia. In accordance with the provisions of the S. C. A. the prerogative of appointing (disharging the judges and state attorneys has been transferred from the parliament to a separate organ—S. C., as provided by Art. 2 of the Constitution of the Republic of Croatia (hereinafter: Constitution) namely, Art. 4 of Constitution provides for the application of Art. 120 of the Constitution according to which the office of the judge is permanent. Such provision develops and strengthens the principle of judicial independence constituting one of the essentials of democracy and a guarantee for protection of any kind of human rights.

III. State Council on the Judiciary

a) Competence

Under the provisions of Art. 12 of S. C. A., and in compliance with Arts 120 and 121 of the Constitution, the competences of the S. C. include:

1. Appointing the presidents of the courts, judges, state attorneys and their deputies;
2. Conducting the procedure and deciding on discharging the presidents of the courts, judges, state attorneys and their deputies;
3. Conducting the disciplinary procedure and deciding on the disciplinary responsibility of the judges, state attorneys and their deputies.

b) Composition of the State Council and Election of Its Members

A new institution—State Council—has been introduced by the S. C. A. in compliance with Art. 121 of the Constitution. The president and 7 members of the S. C. are to be elected among the judges, while 4 members are eligible among the state attorneys and/or their deputies and the remaining 2 members are eligible out of university professors of law, who as a rule have a standing in the profession of at least 15 years (S. C. A., Art. 4, para. 2). It should be emphasized that the S. C. is to be composed of top professionals in various branches of jurisprudence and it may reasonably be assumed that the eligibility of the judges and state attorneys will be based upon their morality and capability, allowing thus for the principles of professional and personal capability to govern their promotion.

"*Zupanijski dom*" [House of the Counties of the Croatian Parliament], following the rules of procedure, is due to ask The Supreme Court of the Republic of Croatia, State

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1 Act on Regular Courts, Arts 69–98 (Narodne novine, 32/88 consolidated text, 16/90, 41/90, 14/91, 66/91.

2 Act on Public Prosecutor, Arts 28–46 (Narodne novine, 34/89, consolidated text, 16/90, 41/90, 41/91, 66/91, 22/92, 39/92).

Attorney of the Republic of Croatia, Association of Attorneys of the Republic of Croatia to propose the personalities who, in their opinion, are eligible for the president and the members of the S. C.[3] The next step is the final propounding of the candidates for such offices to be submitted to the House of Representatives by *Zupanijski dom* (S. C. A., Art. 3). The final election and appointing the president and the members of S. C. for an eight year period is to be made by the House of Representatives (S. C. A., Art. 4).

c) Immunity

The president and the members of the S. C. are exempt from being held accountable in respect of their opinion expressed or votes given in the S. C. The president and the members of the S. C. may neither be imprisoned nor prosecuted without the consent of the S. C., unless caught in the very act of an indictable offence for which a penalty of more than 5 years of imprisonment has been imposed (S. C. A., Art. 8).

d) Termination of Office

In order to maintain the proportions among the individual professions that had been included in the S. C., the provisions of the S. C. A. Article 9 determinates the office of the S. C. president or of the member to cease ex lege on the day the post he occupied at the time of his election into the S. C. is terminated.[4]

The president or the member of the S. C. may be dismissed prior to expiry of the term of his office in the following cases:

1. Upon his request;
2. If a penalty of imprisonment has been imposed on him. The Court that pronounced the prison penalty is due to submit the final judgement to S. C. which in its turn will provide the information to Zupanijski dom.
3. If he is permanently incapacitated to carry on his duty.
4. If he becomes a national of another state.

The decision on dismissal of the president or member of S. C. is to be passed by an absolute majority votes in the House of Representatives.[5]

In case the procedure for dismissal has been instituted, the president or the member may be suspended from exercising his office. The decision on suspension is to be brought by a 2/3 majority votes of all the S. C. members (S. C. A., Art. 11).

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3 Act on Public Attorney of the Republic of Croatia, Art. 37 (Narodne novine, 17/77, 17/86, 19/90, 41/90, 83/92).

4 The elected president or the member of the S. C. is due to take the office within the term prescribed by the House of Representatives of the Parliament (S. C. A., Art. 5). Prior to taking the office the president or the member of S. C. have to take an oath before the President of the Parliament (S. C. A., Art. 7).

5 The reasons for discharging are the same as for the judges of the Constitutional Court of the Republic of Croatia, the discharging determination being vested in the bodies entrusted with the duty to elect.

e) Methods of Work and Financial Resources

The S. C. acts only occasionally and, for the reasons of economy, its administrative, technical and accountancy services are to be provided by the Ministry of Judiciary. In order to ensure the utmost independence and self-directing of the S. C., special funds are provided by the budget of the Republic of Croatia (S. C. A., Art. 40). The president and the members of the S. C. are entitled to remuneration of expenses incurred and to compensation for the reduces salary together with the reward for their work in the S. C. (S. C. A., Art. 41).

The methods of the S. C. work are to be laid down in the rules of procedure adopted by the majority votes of all the members.

IV. Final Considerations

It should be noted that the application of provisions in Sections III to VIII of the S. C. A. related to the procedure for appointing/discharging the judges and state attorneys as well as to the procedure for determining their disciplinary responsibility, will begin on the day of coming into force of the Act regulating the establishment, jurisdiction and organization of the regular courts and state attorneys office. It primarily relates to the Act on Courts, another act crucial for establishing an efficient and independent judicial system. By the realization of the said acts the Republic of Croatia will achieve a judiciary appropriate for a democratic state.

Jozo ČIZMIĆ

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BOOK REVIEW

Pál HORVÁTH: **Frank Ignác** (Ignác Frank), Akadémiai Kiadó, Budapest 1993. 275 pp.

In its series of *A múlt magyar tudósai* (Hungarian Scientists of the Past) *Akadémai Kiadó* has presented the reader with a welcome study, thorough and understanding, by Professor Dr. Pál Horváth on Ignác Frank (1788–1850), a prominent Hungarian jurist and professor of law. A noted scholar in Hungarian private law and professor of the Private Law Department at the Law School of Péter Pázmány University, Ignác Frank has, for a century now, been a subject of much debate and diverse assessments as regards both his personality and his scientific accomplishment. There is hardly any question that his career as well as his works—first of all his major essays and books, especially his conservative national mentality they reveal and the historico–legal school or, more specifically, its Hungarian adaptation providing a legal philosophy basis for such mentality—give good cause for a diversity of appraisals. (Unfortunately, space forbids a discussion of the legal and historical role played by the German historical school (Hugo, Savigny) under contemporary German conditions and in the different Hungarian context [See Gyula EÖRSI: Összehasonlító polgári jog (Comparative Civil Law), Budapest, 1975. pp. 149–150; Vilmos PESCHKA: Thibaut és Savigny vitája (The Dispute between Thibaut and Savigny) in: Jog és jogfilozófia, Budapest, 1980. pp. 26–69; Gábor HAMZA—András SAJÓ: Savigny a jogtudomány fejlődésének keresztútján (Savigny at the Crossroad of the Development of Jurisprudence), Állam- és Jogtudomány XXII/1. 1980. pp. 79–112, etc.], but it must be noted that the relevance and role of Savigny's historico-legal school were more or less adequate to the contemporary set of German conditions, while this cannot be said at all for Ignác Frank's adaptation of that school.) The writer of the appreciation reviewed here being a legal historian, it is no surprise that he should devote relatively little attention to the substance of Ignác Frank's private law record and its legal philosophy basis and still less to their critical assessment. Indeed, it is difficult to say anything new about this after

the appreciations and assessments that the presentation, not particularly opportune, of the conservative national mentality of the historico–legal school in the Hungarian science of private law was aimed at conserving rather than assisting and supporting, in a manner admitting of little doubt, the feudal Hungarian private law in the prevailing pattern of contemporary Hungary's economic, social and political conditions. Consequently the real value of these works on private law consisted in what Ferenc Eckhart, in his work "History of the Department of Political and Legal Sciences", pertinently formulated in these terms: Ignác Frank's works on private law "make it virtually superfluous for one seeking orientation in old private law to know and study all that which was written down before them [Ferenc ECKHART: A jog– és államtudományi kar története. A királyi Pázmány Péter Tudományegyetem története, II (History of the Department of Political and Legal Sciences. History of Royal Péter Pázmány University, II), Budapest, 1936 (quoted by HORVÁTH: op. cit., p. 53)], an assertion which even the author finds to be a slight exaggeration. Equally self–evident is the fact for the legal historian this summation, perhaps the last, of feudal Hungary's private law represents the greatest value in Ignác Frank's works. The most interesting and most informative aspects of Pál Horváth's study are constituted by his careful and thorough presentation of contemporary social, political and chiefly university conditions and, embedded in that context, that of Ignác Frank's career from a Piarist high school student through his professorship to his activity as Dean and Rector. As it becomes clear from the author's assessment, the work of Ignác Frank as a teacher and university leader is also overshadowed by his conservative national attitude and cautious reflections about change and the need for change. Although Pál Horváth emphasizes Ignác Frank's considerable support for József Eötvös's university reform plans, he himself was hardly pressed to show concrete traces thereof. While one may sympathize with an attitude of reserve, withdrawal and a wait-and-see approach in an era of revolutions, with a professor contemplating events from his library's window and worried about his rich and famous library, Ignác Frank can hardly be regarded as a champion of a bourgeois transformation of society and law. There is no denying that, for Hungarian culture and science, the most valuable and abiding part of Ignác Frank's life–work is constituted, apart from his summary account of feudal Hungary's private law, by his imposing library of 14 000 volumes, of which Pál Horváth gives the reader an extremely informative and enjoyable picture. The only point about which one may have some doubt is that whether all the items of his rich collection of books, such as those containing the most modern thoughts of the time (Kant, Hegel, etc.), have indeed brought positive influence to bear on Ignác Frank's thinking and scientific work, as is benevolently supposed by Pál Horváth [HORVÁTH: op. cit., pp. 269–270]. Even if one does not hold that (even passionate) collection of books and reading (not to speak of understanding) them are two quite different things, one may reasonably argue that the some outstanding pieces of his library exercised considerable influence on Ignác Frank's thinking; but it is remarkable that the influence instead of being positive, was confined to provoking his criticism. Ignác Frank was an eminent scholar and professor of the feudal Hungarian private law who observed with clarity that the

epoch of feudalism in Hungary too was due to end soon; he reacted with resignation and disappointment and decided to turn away from the new, emerging world rather than to document the decay of the old Hungarian private law, as it is recalled by Pál Horváth with a great deal of empathy and tact. To cut a long story short, the book under review is worth reading not the least because offers useful insights in many ways.

Vilmos Peschka

HANNIKAINEN, L.: **Cultural, Linguistic and Educational Rights in the Åland Islands.** Publications of Advisory Board for International Human Rights Affairs No. 5, Helsinki 1993. 102 pp.

Åland Islands have been an autonomous province of Finland for more than 70 years. This autonomy, which is based on linguistic and cultural autonomy, constitutes a unique example for the treatment of minorities. The author, as a senior researcher of the Academy of Finland, looked into this autonomy and the implementation of cultural, linguistic and educational rights in this territory from the perspective of international law. He has found out that the principal problem is not that of Finland unduly restricting the rights of the Swedish-speaking population but it appears to be that of whether the restrictions set by the authorities of Åland Province on the use of Finnish language in public life in order to preserve Åland's monolingually Swedish-speaking character in a country where more than 90% of the population is Finnish-speaking are consistent with international human rights conventions as regards the rights of the Finnish-speaking residents of Åland Islands.

The main questions examined in order to throw light upon this problem can be summarized as follows:

1. Development of Åland's autonomy;

2. Status of the Swedish-speaking and the Finnish-speaking population of Åland under international and Finnish law;

3. Linguistic situation in education and in other fields in Åland in the light of the international human rights conventions.

1. It was in 1920 when the newly independent Finnish State granted autonomy to Åland Province in order to counter the nearly unanimous will of the population to have their territory become a part of Sweden. On the initiative of Finland, the League of Nations decided in 1921 that the Åland Islands were to remain under the sovereignty of Finland, but Finland had to strengthen the autonomy granted earlier and ensure the preservation of the Swedish character (language, culture, local habits) of Åland. This decision was implemented in Finnish law by the 1922 Guarantees Act which included provisions for the establishment of Åland's Provincial Parliament and Provincial Government. Swedish was declared as official language even in the official correspondence between the provincial administration and the State authorities, and in education the language of instruction was Swedish. The laws concerning the autonomy and the guarantees for the Swedish character could not be amended without the consent of Åland Provincial Parliament and these amendments had to be enacted by the Finnish Parliament following

the same procedure as that required for the amendment of the Finnish Constitution.

The autonomy was strengthened and the legislative powers of the Provincial Parliament were increased by subsequent legislation in 1951 and 1991. The 1951 Act introduced the so-called right of domicile which could also be called "provincial citizenship". Its acquisition required a domicile period of 5 years in the Åland Islands but the Åland Executive Council had the power to deny it "for weighty reasons" which were considered to include the inadequate ability to speak Swedish. The Finnish Supreme Administrative Court referring to the equality of citizens did not approve this view in 1978, the 1991 Autonomy Act, however, following the opinion that this requirement had a legitimate aim, was reasonable and there was a proportionality between the means employed and the aim sought, there was not inconsistent with the equality, expressly provided that "a resident must also have adequate knowledge of Swedish" for the acquisition of the right of domicile.

Åland Province has its own flag with blue, yellow and red colours, though it was only in 1953 that the President of Finland gave his blessing to its public use. From 1991—according to the 1991 Autonomy Act—"Åland" appears in passports issued in Åland Islands.

The fact that Åland Islands have been a demilitarized region for over a hundred years has had an impact on the value system of the Ålanders: manifestations of militarism and the advocacy of violent solutions have no place in Ålandic society.

2. In Finnish law the Swedish-speaking population is not considered to be a minority in the legal sense, since the Swedish is the second official language of Finland and the Swedish-speaking population is regarded as equal to the Finnish population under the Constitution. The Swedish-speaking population of Finland is a de facto—linguistic, ethnic and national—minority. The Swedish-speaking population of Åland Islands is a part of this but at the same time forms a community of its own. Under international law this distinct national community should be considered as a national minority—concludes the author after considering the basic criteria for minority in international law. The Ålandic population has the right to internal self-determination which is based on a special regime in international law.

Although the Finnish-speaking population belongs to the majority, it is in a minority status in Åland. However, the Finnish-speaking minority does not form a community or group of its own which would express itself as a linguistic, ethnic or national minority. The Finnish-speaking inhabitants' number is quite small and they have adapted themselves to their Swedish-speaking surroundings. They also speak Swedish, since it is taught in every Finnish schools in Finland. They have their own association, the Ahveniset, but only a small proportion of the Ålandic Finnish takes part actively in its activities. In conclusion, it is difficult to recognize the international minority rights of a numerically small group which does not express itself as a distinct community. Nor does the Finnish law treat them as minority.

3. The restrictions on the use of Finnish language are present in various fields, including education, broadcasting, publication and even in consumer protection. As regards television broadcasting, about 60% of the Ålandic population can choose between several Swedish, Finnish and international television channels due to the cable televi-

sions. The rest of them, however, can only choose between two channels: Channel 1 transmits the programmes of Swedish television Channel 1; for Channel 2, a board of Ålandic politicians selects the programmes from the programmes of Swedish television. Finnish-speaking programmes can also be selected but they must have Swedish subtitles. In practice, the board often preferred programmes from Sweden to the Swedish-speaking ones from Finland, even if they were in English. As far as radio broadcasting is concerned, the currently existing six channels broadcast mostly the programmes of Swedish Radio or other Swedish-speaking programmes, only one of them broadcasts in Finnish. This channel's principal recognized purpose is to serve the Finnish-speaking tourists.

In education the language of instruction is Swedish, English is the obligatory second language and Finnish can be chosen as optional third language. Since 1993, there is no need for special permission to teach Finnish in schools, and more than 90% of the Ålandic pupils already study Finnish. It can be a disadvantage for the Finnish-speaking pupils to be instructed in Swedish instead of their native tongue, therefore, if need be, they are given supportive instruction.

Having examined the international human rights conventions concerning education and discrimination, the author concluded that the situation in Åland is not inconsistent with the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The UNESCO Convention Against Discrimination in Education, however, contains several provisions in the light of which the monolingual school system of the Åland Islands appears to be problematic. That is why Finland did not become a party to this Convention at the time of its conclusion but only ten years later when the conflict between the Autonomy Act and the Convention was considered to be of only theoretical character and of no practical significance. In practice, indeed, there were no complaints against the Ålandic school language system and the situation is even less problematic today when the vast majority of students study Finnish as well, due to the fact that the links between the Åland Islands and the Finnish mainland are increasing and the knowledge of Finnish is an advantage on the Ålandic labour market.

The international human rights organs have recognized that the equality and the prohibition of discrimination cannot be interpreted too rigidly, differential treatment has to be accepted in a number of circumstances, therefore the European Court of Human Rights formulated the basic criteria for the determination of lawfulness of such treatment. The Ålandic situation is consistent with these criteria established in the Belgian Linguistic Case.

The European Convention on Human Rights and the Convention on the Rights of the Child are undoubtedly binding on the authorities of the Åland Islands since the Åland Provincial Parliament gave its consent to the Finnish parliamentary acts by which these Conventions were brought into force in Finland. In respect of the UNESCO Convention and the International Covenant on Civil and Political Rights the Ålandic authorities were not asked for their consent, therefore it could be questionable whether they are binding on the Ålandic authorities. On the other hand, Finland is obliged to ensure their implementation on its entire territory without exceptions since it did not make any reservations to them.

Although the present situation has not given rise to complaints by the Finnish-speaking population of the Åland Islands, the future developments might bring about certain problems. For example, if Finland abolished the Swedish being second official language and that caused the increasing number of Finnish people not speaking Swedish, they still could not acquire the right of domicile in Åland but they could claim instruction in Finnish under the human rights conventions. Finland's accession to the European Union will also affect the language situation in the Åland Islands but it is difficult to predict how. The spirit of multiculturalism might cause either the strengthening or the weakening of the restrictions set in order to protect the monolingual character of Åland.

As to the applicability of this model elsewhere, the author concludes that the autonomy and demilitarization could be suitable and welcome for any other minority territory, the system of safeguards for the national character, however, is so particular that it could hardly be suitable model for other situations.

Finally, the book contains an unofficial English translation of the 1991 Åland Autonomy Act attached to the essay and this is followed by a bibliography of over 80 books, articles and reports relating to human rights, in particular cultural and minority rights.

Mónika Weller

MAVI, V.: **The Council of Europe and Human Rights.** Budapest, 1993, 318 pp.

Viktor Mavi's book is the first one in Hungarian which gives a comprehensive review on the Council of Europe's system of human rights protection. It summarizes the results of several years' research dedicated to the analysis of the case law and practice of the European Commission and Court of Human Rights. The most important purpose of the publication is to present, at the level of "daily practice", the expectations and requirements established by the Strasbourg organs for the Council of Europe's member States and to contribute to the use of this protection mechanism by Hungarian nationals, since human rights protection, including compliance with the standards set by the Strasbourg case law, is an important precondition for the rule of law which can be promoted by the individual applications.

In the first part, the author describes the Council of Europe's structure, aims, tasks and competences within the European integration. This is followed by an analysis of the particular features and implementation mechanism of the European Convention on Human Rights, its relationship with the domestic legislation of member States, as well as the right of complaint established by the Convention and the competence and procedure of the Convention organs relating thereto. In this context, a survey is made on the plans for future reforms of the control organs according to which the Commission and Court would either merge and constitute a single Court or become a dual judicial body ensuring protection on two instances.

The second part is dedicated to the practice of interpreting the rights set forth in the Convention, that is the case law of

the Strasbourg organs. This section contains an analysis of the interpretation of the most important rights, namely the right to life (Article 2), prohibition of torture, inhuman or degrading treatment (Article 3), right to liberty and security of person (Article 5), right to a fair trial (Article 6), protection of private and family life, home and correspondence (Article 8), freedom of thought, conscience and religion (Article 9) and freedom of expression (Article 10). The author gives only a selective presentation of the rights and the relevant case law. The basis for the selection was the frequency of reference to the respective rights in the individual complaints and the likelihood that, in the future, these articles might be invoked in cases against Hungary. Each articles subjected to analysis are supplemented by a guide to the relevant case law both of the Commission and the Court in order to facilitate the orientation of those who intend to apply to the Strasbourg organs in concrete cases. This guide contains not only a mere list of cases but, respectively, a brief indication as to the most important issues raised by the applications referred to.

As far as practicability aimed at by the author is concerned, its value is being seriously enhanced by the supplements contained in Part III of the book. In addition to the texts of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Rules of Procedure of the European Court of Human Rights, the most useful supplements are "The application form", a "Guide on how to fill it" and "Information on lodging an application with the Commission".

Having reviewed the book's contents, the conclusion can be made that the analysis of the Council of Europe's human rights protection system and the interpretation of the rights protected, the supplements and the bibliography consisting of more than a hundred references to books and articles relating to this matter gives plenty of information to everybody interested or concerned in human rights issues.

Mónika Weller

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HUNGARIAN LEGAL BIBLIOGRAPHY

1992. 1st PART

Edited by Katalin BALÁZS-VEREDY

This bibliography contains legal works of Hungarian authors issued as monographs in Hungary between the 1st of January and the 30th of June 1992, material of periodicals (articles) and studies published in collective works.

The material for the period 1945–1980 is resumed in the following publication: *Bibliography of Hungarian legal literature*, 1945–1980. Budapest, Akadémiai Kiadó, 1988. 429 p.

The material published from the 1st of January, 1981 is currently processed half-yearly in the *Acta Juridica*, beginning with Tomus 23, 1981. Nos 3–4.

Abbreviations of periodicals and other abbreviations see in *Acta Juridica* Nos 1–2 of 1989.

Periodicals processed in this bibliography:

Acta Humana 5. sz. 1991. [1992.]; JK 1–6/1992.; MJ 1–6/1992.; Közigazg. 1–6/1992.; MTud. 1–6/1992.; TSZ 1–6/1992.; Valóság 1–6/1992.

Collective works processed in this bibliography and their abbrevations:

Közigazg. Int. tanulm. 1992. = Magyar Közigazgatási Intézet. Válogatott tanulmányok. Szerk. Horváth M. Tamás—Wiener György. [Hungarian Institute for Public Administration. Selected studies.] Bp. Cortes Print. 1992. 170 p.

Criminal policy. 1992. = Criminal policy and the rule of law. Studies in criminal law and criminology. Hungary. 1988–1991.—Kriminal-politik und Rechtsstaatlichkeit. Strafrechtliche und kriminologische Beiträge. Ungarn. 1988–1991. Ed. Bárd Károly. [Publ.] Hungarian Society for Criminology. Bp. Bv Kei ny. [mimeogr.] 1992. 151 p. /Proceedings of criminology./

COLLECTIONS OF LAWS AND NORMATIVE ACTS

Hatályos jogszabályok gyűjteménye. [1945–] Összeáll. Borbíró István—Csík Ildikó [stb.] Szerk. Egriné Rónai Márta—Hársfalvi Rezsőné [stb. 8. kiad. Collection of the legal statutes in force. 1945–. 8th ed.] Bp. Közgazd. és Jogi K.—Hírlapk. 1992. [Szabadlapos szerkezetben.]

Magyar jogszabályok mutatója. 1945–1991. Összeáll. Egriné Rónai Márta—Glatt Gábor [stb.] Lezárva: 1992. jan. 1. [Index to Hungarian law in force. 1945–1991. Closed: January 1, 1992.] Bp. Közgazd. és Jogi K.—Juros K. 1992. 351 p.

A Magyar Köztársaság jogszabályai. 1991. Törvények, rendeletek, határozatok. 1. köt. [Törvények, kormányrendeletek.] 2. köt. [Miniszteri rendeletek, országgyűlési határozatok, alkotmánybírósági határozatok, köztársasági elnöki határozatok, kormányhatározatok, miniszterelnöki rendeletek és határozatok, nemzetközi szerződések.] Szerk. Király György. Lezárva: 1992. jan.1. [Statutory rules of the Republic of Hungary. 1991. Acts, decrees, resolution. Vol. 1. Acts, government decrees. Vol. 2. Ministerial decrees, resolutions of Parliament, resolutions of the Constitutional Court, decisions of the President of the Republic, Government resolutions, decrees and resolutions of the Prime Minister, international treaties. Closed: January 1, 1992.] [Bp.] Unió K. 1992. 866, [6], 869–1978, [2] p.

A Magyar Országgyűlés jogalkotása. [Törvények, országgyűlési határozatok, országgyűlési állásfoglalások.] 1. [köt.] 1990. máj. 2. — dec. 31. Szerk. biz. eln. Szabad György. Szerk. biz. Bánki Miklós—Soltész István—Túry Mária. Kiad. a Magyar Országgyűlés. [Legislative activity of the Hungarian Parliament. Acts, Parliament decisions, Parliament stands. Texts. Vol. 1. From May 2, 1990 to December 31, 1990.] Bp. Hírlapk. 1992. 294 p.

Törvények és rendeletek hivatalos gyűjteménye. 1991. 1–2. köt. Közzéteszi az Igazságügyi Minisztérium—Miniszterelnöki Hivatal. [Official collection of acts and decrees. 1991. Vols 1–2.] Bp. Közgazd. és Jogi K. 1992. XXXI, 1046, [2], [6], 1047–2206, [2] p.

PRACTICE OF COURTS

Az Alkotmánybíróság határozatai. 1991. Szerk. Sólyom László—Holló András. [Decisions of the Constiutional Court. 1991.] [Bp.] Triorg Kft. [1992.] 913, [4] p.

COLLECTIONS OF STUDIES

Criminal policy and the rule of law. Studies in criminal law and criminology. Hungary. 1988–1991.— Kriminalpolitik und Rechtsstaatlichkeit. Strafrechtliche und kriminologische Beiträge. Ungarn. 1988–1991. Ed. Bárd Károly. [Publ.] Hungarian Society for Criminology. Bp. Bv Kei ny. [mimeogr.] 1992. 151 p. /Proceedings of criminology./ Bibliogr. passim.

Magyar Közigazgatási Intézet. Válogatott tanulmányok. Szerk. Horváth M. Tamás—Wiener György. [Hungarian Institute for Public Administration. Selected studies.] Bp. Cortes Print. 1992. 170 p. Bibliogr. passim.

I. PHILOSOPHY OF LAW

Books

European conference on "Similarities and differences in the adaptation of the countries of Central Europe to the European Community". Budapest, 28–30 November 1991. [Papers. Publ.] European Cooperation Foundation. Bp. Akadémiai ny. 1992. 157, [2] p. Studies in English and German.

KISS László: A politikai és a szakmai elemek helye és szerepe a jogalkotásban, különös tekintettel a törvényalkotásra. [Közzéteszi az] Államtudományi Kutatóközpont. [Place and role of political and

professional elements in codification, with special respect to legislation.] Bp. OMIKK ny. [mimeogr.] 1991. [1992. 2], 225 p. Bibliogr. passim.

KULCSÁR Kálmán: Systematic change in East Central Europe. Political and legal problems of transition; the lessons of the Hungarian case. [Publ.] Public Law Research Center of the Hungarian Academy of Sciences. Bp. OMIKK ny. [mimeogr.] 1991. [2], 75 p. Bibliogr. 70–76.

Articles

BADÓ Attila: Bevezetés a precedensjogba. [Introduction to the law of precedents.] JK 6/92:289–295.

BIBÓ István: A jogelmélet fő kérdései tegnap és ma. [1990. Principal problems of the theory of law in past and present.] JK 3–4/92:89–94.

BIHARI Mihály: Rendszerváltás, felelősség és igazságosság. [Change of system, responsibility and justice.] TSZ 1/92:79–84.

BRAGYOVA András: Az igazságtétel legalitása. [Legality of the process of doing justice.] MTud. 2/92:143–156.

HORVÁTH János: "Fedetlen lélekkel" a bírói hatalom néhány feltételéről. [Some conditions of judicial power—comments with an unprejudiced mind.] MJ 5/92:300–307.

HORVÁTH Pál: A jogállamiság történelmi szerepe. [Historical role of constitutional statehood.] JK 3–4/92:191–194.

SAMU Mihály: A jogi eljárás — a jog lényeges sajátossága. [The legal procedure, a substantial particularity of the law.] MJ 4/92:193–202.

SZABADFALVI József: A jog fogalma és a vele összefüggő problémák. Moór Gyula jogi alaptana. [The concept of law and problems related to it. The doctrine of legal foundations of Gyula Moór.] MJ 5/92:264–269.

SZÁJER József: Salzburgi konferencia az igazságtételről. [1992. márc. A conference in Salzburg on how to do justice. March, 1992.] JK 3–4/92:195–197.

SZILÁGYI Péter: Elévülés, visszaható hatály, alkotmányosság. Megjegyzések az ún. igazságtétel kérdéséhez. [Prescription, retrospective effect, constitutionality. Remarks to the problem of how to do justice.] MJ 6/92:338–339.

VARGA Csaba: Szabad-e ítélnünk a múltról? Jogfilozófiai megfontolások. [Are we allowed to judge the past? Considerations from the aspect of the philosophy of law.] JK 1/92:10–14.

VARGA Csaba—SZÁJER József: A jogi technika. [Technics in law.] MJ 2/92:65–71.

II. PUBLIC LAW & CONSTITUTIONAL LAW

Books

Act No. LV [of 1990] on the legal status of Members of the National Assembly. [Bp.] s.p. [mimeogr. 1992.] 13 p.

Act No. XC [of 1990] on the legal status, office and responsibilities of the Presidential Commissioners. [Bp.] s.p. [mimeogr. 1992.] 9 p.

Act No. XXXIII [of 1990] on the provisional regulations concerning the legal status of State Secretaries. [Bp.] s.p. [mimeogr. 1992.] 10–18 p.

Act No. LVI of 1990 on the remuneration, expense refunding and privileges for Members of the National Assembly. [Bp.] s.p. [mimeogr. 1992.] 14–21 p.

ÁDÁM Antal: La contrôle de la constitutionnalité des actes administratifs et gouvernement aux en Hongrie. [Control of the constitutionality of the administrative and government statutory rules in Hungary.] Pécs, Vadas Ksz. 1992. 32 p. /Studia iuridica auctoritate Universitatis Pécs publicata 121./

Alkotmánytan. Szerk. Kukorelli István. Lezárva: 1992. jan. 1. [Principles of constitutional law.] Bp. Századvég K. 1992. 599 p. /Politika./ Bibliogr. passim.

Az állam és egyház kapcsolatrendszere egyes európai országokban. [Ausztria, Belgium, Franciaország, NSZK, Olaszország, Spanyolország, Svájc.] Szerk. Trócsányi László—Trócsányi László, ifj. [Közzéteszi a] Magyar Tudományos Akadémia Államtudományi Kutatások Programirodája. [System of relations between states and churches in some European countries. Austria, Belgium, France, Federal Republic of Germany, Italy, Spain, Switzerland.] Bp. OMIKK ny. [mimeogr.] 1990. 184 p. Bibliogr. 184.

DEZSŐ Márta—BRAGYOVA András: A köztársasági elnök a parlamentáris rendszerekben. [Közzéteszi a] Magyar Tudományos Akadémia Államtudományi Kutatások Programirodája. [The president of the republic in parliamentary systems.] Bp. OMIKK ny. [mimeogr.] 1989. [4], 95 p. Bibliogr. 89–95.

FÜRCHT Pál—SZABÓ Lajos—VIRÁG Rudolf: Az önkormányzati törvény a gyakorlatban. [The Act on self-governing bodies in practice.] Bp. HungAvia Kft. 1992. 194 p. Bibliogr. 193.

A helyi jogalkotás környezete, az önkormányzati szabályozás lehetséges perspektívái. Összeáll. Kiss László. Kiad. [a] BM Államigazgatási Szervezési Intézet. [Surroundings of local legislation—possible perspectives of regulation by self-governing bodies.] Pécs, Vita Kft. ny. [mimeogr.] 1990. [1992.] 355 p. /Az önkormányzati jogalkotás megalapozása 1./

International conference on institutional guarantees of the safeguarding of constitutionalism. Hosted and org. by Hungarian Academy of Sciences and Hungarian Ministry of Justice. Budapest 25–27 April, 1989. Ed. Hlavathy Attila. [Publ.] Hungarian Academy of Sciences, Research Centre for Political Science. Bp. OMIKK Print. [mimeogr.] 1990. [2], 270 p.

KUKORELLI István: Közjogi tűnődések. [Studies in public law.] [Bp.] Triorg Kft. 1991. [1992. 2], 117 p. Bibliogr. passim.

Önkormányzati választások. 1990. Összeáll. és szerk. Bőhm Antal—Szoboszlai György. [Közzéteszi az] MTA Politikai Tudományok Intézete. [Local elections. 1990.] Bp. Tótfalusi Tanny. 1992. 593 p.

Parlamenti választások. 1990. Politikai szociológiai körkép. Szerk. Szoboszlai György. [Közzéteszi az] MTA Társadalomtudományi Intézet. [Parliament elections. 1990. A survey of political sociology.] [Bp.] s.p. 1990. [1991. 8], 623, [136] p.

Vita a gyermekek jogairól, valamint a gyermek- és ifjúságvédelmi gondoskodásról szóló törvénytervezetről. — Az antiszociális fejlődésirányú fiatalok oktatásának kérdései. A Magyar Kriminológiai Társaság tudományos ülésein — 1990. márc. 7., ápr. 19. — elhangzott előadások, hozzászólások. Szerk. Kerezsi Klára. [Debate on a draft bill bearing the rights of children and the care for the protection of children and the youth.—Problems of the education of juveniles with an anti-social tendency of development. Lectures and comments at the scientific meetings of the Hungarian Association of Criminology held on March 7 and April 19, 1990.] Bp. IM. Bv. Háziny. [mimeogr.] 1991. [1992.] 207 p. /Kriminológiai közlemények 40–41./ Bibliogr. passim.

Articles

BAKA András: Az Európai Emberi Jogi Konvenció és a kisebbségek nemzetközi jogi védelme. [The European Convention of Human Rights and the protection of minorities under international law.] MKözigazg. 4/92:193–200.

BALSAI István: A magyar Alkotmánybíróság a kormányzat szemszögéből. [The Hungarian Constitutional Court as seen from the aspect of the Government]. JK 6/92:282–286.

BÁN Tamás: Az európai emberi jogi egyezmény hatásai a nemzeti törvényhozásra. [Effects of the European Convention of Human Rights upon national legislation.] MJ 3/92:129–136.

BÉKEFI Ottó: A helyi választási törvény előkészítéséről. [On the preparation of the Act on local elections.] = Közigazg. Int. tanulm. 1992. 60–81.

BLUTMAN László: A vallásszabadság az Egyesült Államok alkotmányjogában: mi a vallás? [Freedom of religion in the constitutional law of the United States: what is religion?] JK 2/92:72–78.

FÖLDESI Tamás: Alapjog (legyen)-e a peticiós jog? [Should be the rights of petition a fundamental right?] TSZ 6/92:34–42.

KIS János: Az Alkotmánybíróság az élethez való jogról. [The Constitutional Court on the right to life.] JK 3–4/92:118–133.

KISS Daisy: A kétharmados törvényhozás. [Legislation with a required two thirds quorum.] MJ 5/92:279–285.

LÁBADY Tamás: A magyar Alkotmánybíróságról szóló törvény. [The Hungarian Act on the Constitutional Court.] JK 6/92:287–288.

MORVAI Krisztina: Emberi jogok, jogállamiság és a "visszamenőleges" igazságszolgáltatás. [Human rights, constitutional statehood and "retrospective" administration of justice.] JK 2/92:62–71.

NEMES Dénes: Politikai és jogi-hatásköri konfliktusok az Országgyűlés és az Alkotmánybíróság eddigi működése során. [Political and judicial-competence conflicts in the activity of the Parliament and the Constitutional Court.] JK 2/92:45–51.

POKOL Béla: Aktivista alapjogász vagy parlamenti törvénybarát? A magyar alkotmánybíráskodásról. [Fundamentalist law activists or favouring the acts of Parliament? The administration of constitutional justice in Hungary.] TSZ 5/92:67–78.

SALAMON László: Az Alkotmánybíróság önértelmezése. [The self-interpretation of the Constitutional Court.] JK 6/92:272–275.

SAMU Mihály: Plurális demokrácia — kisebbségi politika. Kollektív jogok és a kisebbségek államalkotó minősége. [Pluralist democracy—minority policy. Collective rights and the state-forming feature of minorities.] Valóság 4/92:49–61.

SÓLYOM László: Az Alkotmánybíróság a Parlament szemszögéből. [The Constitutional Court as seen from the aspect of Parliament.] JK 6/92:276–281.

SZEKFŰ Gábor: Alkotmány és alkotmánybíráskodás. Az alapjogok értelmezése és védelme az Alkotmánybíróság határozatainak tükrében. [Constitution and jurisdiction by the Constitutional Court. Interpretation and protection of the fundamental rights as reflected by the decisions of the Constitutional Court.] JK 2/92:52–61.

SZENTE Zoltán: A közigazgatás szerepe a menekültügyben. [The role of public administration in refugee problems.] MKözigazg. 1/92:38–53.

TÖRŐ Károly: Az alkotmánybíráskodás és a "láthatatlan alkotmány". [Administration of constitutional justice and the "invisible constitution".] MJ 2/92:85–90.

VÁGVÖLGYI Péter: Az állampolgári jogok országgyűlési biztosa. [The ombudsman.] MKözigazg. 2/92:95–102.

ZOLTÁN Ödön: Az audiovizuális közlés szabadságáról. [On the freedom of audiovisual transmission.] MJ 3/92:145–149.

III. ADMINISTRATIVE LAW

Books

BAKÁCS Tibor: Magyar környezetjog. [Hungarian law on environment.] Bp.—Berlin [stb.] Springer Hungarica K. 1992. 240 p. Bibliogr. 99–100.

BÉRCESI Ferenc—FÜRCHT Pál—KOVÁCS Katalin—KISS László: Az önkormányzatok együttműködéses (társulásos) kapcsolatainak jelene és fejlesztésének főbb irányai. Szerk. Kiss László. [Közzéteszi a] Magyar Közigazgatási Intézet. Lezárva: 1991. jún. 1. [Present relations of co-operation between self-governing bodies and main trends of their development. Closed: June 1, 1991.] Bp. Interpress K. 1991. [1992. 2], 345 p. /Az önkormányzatok koordinációs kapcsolatainak megalapozása 1./ Bibliogr. 338–341.

A feladat, szint, szervezet és jogalkalmazás egyes kérdései az önkormányzatokban. Tanulmányok az önkormányzati törvény alkalmazásához. 1. r. Szerk. Kökényesi József. Kiad. [a] Magyar Közigazgatási Intézet. [Some problems of tasks, levels, organization and the application of law in self-governing bodies. Studies to the application of the self-government Act. Part 1.] Bp. Interpress K. 1991. [1992. 4], 128, [2] p. /Közigazgatási füz. 1./ Bibliogr. 96.

A közszolgáltatások szervezésének időszerű jogalkotási és jogalkalmazási kérdései. [Irta] Kékesi László—Kiss László [stb.] Kiad. [a] Szervezésrendszertani Betéti Társaság. Lezárva: 1991. okt. 1. [Topical problems of legislation and law application concerning the organization of public services. Closed: October 1, 1991.] Bp. Alfprint [mimeogr.] 1991. [10], 364 p.

Magyar Közigazgatási Intézet. Válogatott tanulmányok. Szerk. Horváth M. Tamás—Wiener György. [Hungarian Institute for Public Administration. Selected studies.] Bp. Cortes Print. 1992. 170 p. Bibliogr. passim.

A megye a magyar önkormányzati rendszerben. Szerk. Csefkó Ferenc. [Közzéteszi az] MTA Regionális Kutatások Központja. [Counties in the Hungarian system of self-government.] Pécs, G-ny. Bt. 1992. 149 p.

Összefoglaló a Magyar Tudományos Akadémia elmúlt évi [1991] tevékenységéről. [Summary of the activity of the Hungarian Academy of Sciences in 1991.] [Bp.] Akaprint ny. [1992.] 229 p.

Self-governmental operations and ownership. Publ. Ministry of Finance. Bp. Perfekt Print. [mimeogr.] 1992. 36 p. /Public finance in Hungary 92./

Articles

BALÁZS István: Az állam változó szerepkörének hatása a közigazgatási intézményekre. [Effects of the changing state role upon the institutions of public administration.] = Közigazg. Int. tanulm. 1992. 149–162.

BALÁZS István: A közszolgálati jogviszony személyi hatálya a világ főbb közszolgálati rendszereiben. Elvek, rendszerek, tendenciák. [Personal effects of the legal relationship in civil service in the principal civil service system of the world. Principles, systems, tendencies.] MKözigazg. 2/92:78–88.

BALÁZS István: Az állam változó szerepkörének hatása a közigazgatási intézményekre. [The effect of the changing state role upon public administrative institutions.] MKözigazg. 5/92:257–265.

BÁLINT Tibor: Az önkormányzatok tulajdona. [The property of self-governing bodies.] MKözigazg. 3/92:154–160.

BÓRA Ferenc: Önkormányzat és az iskola önszerveződése. [Self-government and self-organization in schools.] MKözigazg. 4/92:240–246.

CSALÓTZKY György: A magyar önkormányzatok nemzetközi kapcsolatai. [International relations of Hungarian self-governing bodies.] MKözigazg. 2/92:108–115.

CSEFKÓ Ferenc: Területi politika — települési érdekvédelem. [Regional policy—protection of the interests of settlements.] TSZ 2/92:67–76.

CZUGLERNÉ BITTÓ Márta: Európai Emberi Jogi Egyezmény és a szabálysértési jog. [The European Convention of Human Rights and the law of petty offences.] MKözigazg. 6/92:324–335.

DOBOS Krisztina—DOBSI Attila: A közoktatási törvényi koncepció és az önkormányzatiság. [The concept of the Act on public education and the substance of self-governing.] MKözigazg. 4/92:234–240.

DUDÁS Ferenc: Gondolatok a szolgáltató közigazgatásról. [Thoughts on a service-based public administration.] MKözigazg. 2/92:103–107.

FOGARASI József: A képviselőtestületek alakuló ülései. [The forming sessions of representative administrative bodies.] MKözigazg. 1/92:54–57.

GAJDUSCHEK György: Az önkormányzat és a lakosság közötti kapcsolat intézményei az átalakulás időszakában. [Institutions of ruling relations between self-governing bodies and the population in the period of transition.] = Közigazg. Int. tanulm. 1992. 82–95.

HORVÁTH György: A közüzemek, közművek és kommunális vállalatok átalakulása. [Transformation of public works, public utilities and communal enterprises.] MKözigazg. 5/92:281–287.

HORVÁTH István: A közalkalmazottak jogállása — félidőben a törvényalkotás. [The legal status of public employees — legislation after its first half-time.] MKözigazg. 2/92:71–77.

HORVÁTH István: A közalkalmazottak jogállása. [The legal status of public employees.] TSZ 1/92:61–68.

JUHÁSZ Endre: A közműolló alakulása az önkormányzati feladatok tükrében. [The tendency of the gap between public services as reflected in the tasks of self-governing bodies.] MKözigazg. 5/92:222–227.

KÁCSOR József: A nagyvárosok fejlődésének jellemzői — világgazdasági kitekintés. [Characteristics of the development of big cities—an outlook to world economy.] = Közigazg. Int. Tanulm. 1992. 128–148.

KÁCSOR József: A nagyvárosi fejlődés jellemzői. [Characteristics of metropolitan development.] MKözigazg. 3/92:138–153.

KARA Pál—VIRÁG Rudolf: A köztársasági megbízottak működési tapasztalatai. [Experiences of the Commissioners of the Republic in their functioning.] MKözigazg. 3/92:129–138.

KLEMENT Tamás: A központi közigazgatás részvétele az önkormányzatok tisztviselői és szakemberei továbbképzésében. [Participation of the central public administration in the postgraduate training of the officials and experts on self-governing bodies.] MKözigazg. 2/92:116–119.

A kormány határozata a közigazgatás korszerűsítéséről. [1992. ápr. 16. Szöveg. Government decision on modernization of the public administration. April 16, 1992. Text.] MKözigazg. 5/92:277–280.

KOVÁRIK Erzsébet: Közintézet mint közjogi kategória fejlődése a magyar közigazgatásban. [Development of the public institute as a category of public law in Hungarian public administration.] = Közigazg. Int. tanulm. 1992. 11–32.

KÖKÉNYESI József: A helyi önkormányzatok gazdasági alapjai. [Economic bases of local self-governing bodies.] = Közigazg. Int. tanulm. 1992. 96–112.

LADÁNYI Andor: A felsőoktatási törvény néhány kérdéséről. [Some problems of the Act on higher education.] JK 3–4/92:182–190.

MÁDL Ferenc: "... egyetem és Akadémia nem zárják ki, hanem inkább kiegészítik egymást". ["... University and Academy do not exclude, rather complement each other."] MTud. 6/92:657–659.

MAGYAR Levente—SZIVÓS Jánosné: Szociálpolitika és egészségügy az önkormányzatok szemszögéből. [Social policy and public health from the aspects of the self-governing bodies.] MKözigazg. 5/92:288–297.

MÉSZÁROS József: A saját ügy fogalmának értelmezése a közigazgatási hatósági eljárásban. [Interpretation of the concept of "own case" in administrative procedure.] MKözigazg. 6/92:383–384.

MÓNUS Lajos: Az országos hatáskörű szervek helyzetének rendezése. [Settlement of the situation of organs with national competence.] = Közigazg. Int. tanulm. 1992. 33–45.

ORMOSY Viktor: Önkormányzat és vállalkozás. [Self-government and entrepreneurship.] MKözigazg. 4/92:228–233.

Az önkormányzati működés első éve. [First year of functioning of the self-governing bodies.] MKözigazg. 1/92:1–17.

PAPP László: A "közigazgatási büntetőbíráskodás" problematikája. [Problems of "administrative criminal jurisdiction".] MKözigazg. 6/92:336–340.

PERCZEL György: Adalékok a környezetvédelem intézményesülésének történetéhez. [Remarks to the history of institutionalizing environment protection.] MKözigazg. 1/92:31–37.

PORDÁN Endre: Változások a népjóléti igazgatás területén. [Changes in the field of public welfare administration.] MKözigazg. 5/92:298–303.

SZABÓ Gábor: Az önkormányzat külső kapcsolatrendszere a hatályos jog tükrében. [The external system of relations of self-governing bodies as reflected by the positive law in force.] = Közigazg. Int. tanulm. 1992. 46–59.

SZABÓ Gábor: A szociális törvényhozás egyes kérdései, különös tekintettel a hazai jogi szabályozás előkészítésére. [Some problems of social legislation with particular respect to the preparation of Hungarian legal regulation.] MKözigazg. 5/92:304–313.

SZAMEL Lajos: A jogutódlásról a közigazgatási jogban. [Legal succession in administrative law.] MKözigazg. 4/92:201–206.

Személyi nyilvántartások története, nemzetközi megoldások. [The history of holding personal registers—international solutions.] MKözigazg. 3/92:161–168.

SZIGETI Ernő: A terület- és településfejlődés főbb jellemzői a[z 19]80-as évtizedben. [Main characteristics of regional and settlement development in the decade of the 1980s.] = Közigazg. Int. tanulm. 1992. 113–127.

TAKÁCS Klára: Nemzetközi áttekintés a köztisztviselők képzéséről, képesítési előírásairól és bérezéséről. [The professional formation, qualification prescriptions and salary conditions of civil servants. An international survey.] MKözigazg. 2/92:120–126.

TAMÁSI Péter: A tudományirányításról és -értékelésről. [The orientation and assessment of science.] MTud. 2/92:362–367.

TORMA András—VARGA Jenő—TÓTH Anikó: Korszerűsítési irányzatok Németország helyi közigazgatásában. [Modernization trends in local administration in Germany.] MKözigazg. 4/92:252–256.

UTTÓ György: A közigazgatási bíró kezdeti tapasztalataiból. [Starting experiences of an administrative judge.] MKözigazg. 4/92:217–221.

VÁRFALVI István: A TÁKISZ-ok [területi államháztartási és közigazgatási információs szolgálatok] tevékenysége. [The activity of regional information services in the field of state budget and public administration.] MKözigazg. 6/92:341–349.

WELLMANN György: Az önkormányzatok helyzete a privatizáció során. [The situation of self-governing bodies as related to privatization.] MJ 6/92:329–332.

ZSUFFA István: Törvény a köztisztviselők jogállásáról. [Act on the legal status of civil servants.] MKözigazg. 2/92:65–70.

IV. FINANCIAL LAW

Books

Act [LXIX:1991] on financial institutions. Publ. Ministry of Finance. Bp. Perfekt Print. [mimeogr.] 1992. 102 p. /Public finance in Hungary 91./

MIKULA János: Üzlet vállalkozásban. Magán — társasági — szövetkezeti — piaci. Szerk. Sándor László. Lezárva: 1991. okt. 10. [Business ventures. Private—joint—co-operative—market forms. Closed: October 10, 1991.] Bp. Novorg K. [mimeogr.] 1991. [8], 121, [38] p.

Regulation of competition and pricing. [Act LXXXVI of 1990 and Act LXXXVII of 1990.] Bp. Perfekt [mimeogr.] 1991. 22 p. /How to do business in Hungary. Informations on some legal rules 17./

SIKE Olga—GAJERHOSSZNÉ HAJÓS Zsófia—ANNUSNÉ KOVÁCS Valéria: Az egyéni vállalkozó magánkereskedők 1992. évi adózási szabályai. SZJA, ÁFA, fogyasztói adó, adózás rendje. [Taxation rules of private entrepreneur merchants for 1992. Individual income tax, general turnover tax, consumer's tax, order of taxation. Bp. Szövorg ny. 1992. 89 p. /KISOSZ füz. '92./

Unternehmungsfordernde Kredit. [Venture promoting credits.] Bp. Perfekt Druck. [mimeogr.] 1992. 39 p. /Praktische Informationen für Ausländer. Praktische juristische Regelungen 24./

Venture promoting credits. Bp. Perfekt Print. [mimeogr.] 1992. 41 p. /How to do business in Hungary. Informations on some legal rules 24./

Articles

BOTOS Katalin: A vidék bankja. [Local banks.] MKözigazg. 6/92:321–323.

DARÁZS Imréné: A helyi önkormányzatok gazdálkodása. [Economic management of local self-governing bodies.] MKözigazg. 3/92:169–179.

FERENCZY Endre: Az államháztartásra vonatkozó törvényhozásról. [Legislation on state budget.] JK 5/92:226–233.

FÖLDES Gábor: Történt-e nálunk adórendszerváltás? [Was there a change in the tax system in Hungary?] TSZ 2/92:14–23.

GEDEI György—MAGYAR Levente: Helyi kezdeményezés önkormányzati hitelszervezet létrehozására. [Local draft initiative for setting up a self-government credit system.] MKözigazg. 6/92:377–379.
KASZA Péter—RIGÓ Barnabás: A helyi adóról. [Local taxes.] MKözigazg. 3/92:186–189.
SZÁNTÓ Anikó: Államháztartás a dirigizmus jegyében. [State budget in the signe of dirigism.] TSZ 1/92:3–11.
TAKÁCS Klára: Helyi önkormányzati hitelintézetek Nyugat-Európában. [Franciaország és Belgium. Local credit institutes of self-governing bodies in Western Europe. France and Belgium.] MKözigazg. 6/92:367–371.

V. CIVIL LAW

Books

Binding force of contract. Ed. Harmathy Attila. Publ. Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences. Bp. Akaprint. 1991. [1992.] 115, [4] p. Bibliogr. passim.
A gazdasági társaságokról, a külföldiek magyarországi befektetéseiről szóló törvények és a külföldiek ingatlanszerzésére vonatkozó kormányrendelet. [Szövegek.]—Acts on business organizations, and on investments by foreigners in Hungary, government decree relating to the acquisition of real estate by foreigners. [Texts.]—Gesetze über die Wirtschaftsgesellschaften und die Anlagen von Ausländern in Ungarn, Regierungsverordnung über den Liegenschaftserwerb von Ausländern. [Texte.] Szerk. Király György. [Bp.] Typorama Kft. 1992. 235, [6] p.
KIS János: Az abortuszról. Érvek, ellenérvek. [On abortion. Pro and con arguments.] [Bp.] Cserépfalvi K. 1992. 236 p. Bibliogr. passim.
A polgári törvénykönyv. Összeáll. és jegyz. Baranyai János—Kecskés László—Nemes András. Lezárva: 1992. jan. 31. [Civil code. Closed: January 31, 1992.] Bp. Közgazd. és Jogi K. 1992. 462, [2] p. /Kis jogszabály sorozat./
VÖRÖS Imre: Az európai versenyjogok kézikönyve. [Manual of European statutes on competition.] [Bp.] Triorg Kft. [1992.] 190 p. Bibliogr. passim.

Articles

BÁNHEGYI Ilona: A bankgarancia. [The bank guarantee.] JK 5/92:218–225.
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Magyarország történeti statisztikai helységnévtára. 2. [köt.] Veszprém megye. Szerk. Kovacsics József. Kiad. a Magyar Tudományos Akadémia Történeti demográfiai albizottsága — Központi Statisztikai Hivatal Lakossági adatgyűjtések főosztálya. [Historico-statistical gazetteer of Hungary. Vol. 2. County Veszprém.] Bp. KSH [mimeogr.] 1991. 295, [8] p. Bibliogr. 292–294.

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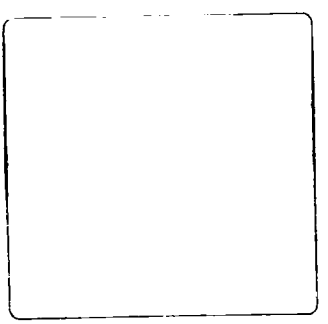

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FOREWORD

The present issue of *Acta Juridica Hungarica* publishes the papers (sometimes in a revised version) submitted to the First European Regional Conference of the International Law Association (ILA) held in Budapest, 2–5 October 1993. The papers are published, in a general way, in the chronological order of their presentation at the conference. The papers published here, could not claim to be, however, a full presentation of the materials of the conference, since several contributions were presented only orally and their authors renounced from submitting them in a written form. Moreover, the papers printed here do not reflect the discussions that naturally followed their reading, except, of course, in so far the authors took into consideration of the debates of their papers.

The editor wishes to thank in the name of the Hungarian Branch of the ILA the Executive Council of the International Law Association, especially its chairman, The Right Honourable Lord Slynn of Hadley and his predecessor, The Right Honourable Lord Wilberforce. The editor and the Hungarian Branch owes much, and acknowledges this with thanks, to Professor James Crawford, Director of Studies of the ILA for his kind support in many questions, especially in the scholarly programme of the conference. Last but not least, the editor wishes to acknowledge with thanks a donation made by the Japan Foundation.

Ed.

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Akadémiai Kiadó,
Budapest

PREFACE

Since its foundation in 1873, the International Law Association has carried out most of its work through biennial general conferences to which its various committees have reported. The 66th such conference is about to be held in Buenos Aires.

But there has been a demand for a forum in non-conference years, at which issues of concern to ILA members could be aired and the work of particular committees introduced or advanced. It was thought useful to target in this context regions where the ILA and its work needed to be reinforced. Thus the Executive Council welcomed an invitation from the Hungarian Branch of the ILA to hold its first European Regional Conference in Budapest in October 1993. This was a most appropriate choice of venue given the extraordinary changes that have occurred in Central Europe since 1989. The Conference theme, "The Transformation of Europe: Its Impact on International Law", proved a useful umbrella under which a very wide range of legal issues of relevance to the region were discussed. The metaphor of the umbrella may seem worn, but is was appropriate, not least because it rained torrentially for the duration of the Conference. Despite—or because of—this, the interest and participation of those attending remained high throughout, and, as the ILA's Patron, Lord Wilbeforce, emphasized in reporting to the Executive Council on the success of the Conference, the quality both of the papers and the discussion was first class.

The work of the Conference was organized under a series of topic headings: (1) New and Reborn States in Europe and their Relationship to International Law; (2) Human Rights, Minority Rights and the Protection of Refugees; Questions of Definition, Implementation and Control; (3) Conflict Resolution—Old and New Methods; (4) International Commercial Law; (5) International Trade Law and Regional Economic Development; and (6) International Environmental Law. This volume brings together a selection of the papers given to the Conference, and demonstrates both the variety of issues facing the region and the way in which existing legal ideas and structures are being coopted, modified and developed in aid of their solution.

The ILA expresses its gratitude to the Hungarian Branch, to Professor Hanna Bokor-Szegő, its President, and to the members of the Organizing Committee, especially to Professor Vanda Lamm and Dr András Bragyova. The assistance and cooperation of the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences is also gratefully acknowledged. Above all, thanks are due to Professor Lamm, who bore the main brunt of the organization of the Conference and of collecting and editing these papers.

It is a mark of the success of the Conference that a second regional ILA Conference, covering the Asia Pacific Region, is to be held. This will be hosted by the China Taiwan Branch of the ILA and will be held in Taiwan, from 27 to 30 May 1995.

James Crawford
Director of Studies

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Budapest

STUDIES

Tibor VÁRADY

International Law and the Transformation of Europe —An Essay in Realism and Idealism

Keynote Address at the First European Regional Conference of the ILA

In this time of strife and disunion around Central and Eastern Europe, I would like—by this introduction—to remember two unions, both of which were forged hundred and twenty years ago. In 1873, a year of harmony marked by the birth of both Caruso and Chaliapin, the year when Tolstoi wrote Anna Karenina and Germany adopted the Mark as its currency, *the ILA was founded in October in Brussels.* In the very same year of 1873, *the cities of Pest and Buda united, to form Budapest, the capital of Hungary.*

During the last hundred and twenty years—which hardly left anything uncontested—the justification of these two unions was never really questioned. Today, their paths have crossed to spark and inspire another (this time much more difficult) union—that of Europeans under international law.

This First European Regional Conference of the ILA in Budapest is devoted to the transformation of Europe. This transformation—which is far from being completed—has shocked us, and thrilled us in the course of the last five years. It has proved that even our most daring dreams may come true—and that the same applies to nightmares as well.

A social structure feared and deplored by most, collapsed virtually overnight. Its vanishing left a void, however, and the speed of the breakdown left no time for the unfolding of a viable alternative before the critical moment, when the change became suddenly possible. The room for alternatives in Central and Eastern Europe is now wide, wide enough to accommodate both hope and despair. On the Western side of our Continent, the dramatic change of our time is that towards a union, which is not sudden

and unprepared, yet the reality of which is still baffling, and many consequences are taking both partisans and opponents by surprise.

I know that one is inclined to overestimate the importance of the present moment, and of the events we are just living. One could hardly keep counting of the sports encounters within the past decade only, which have been proclaimed to be the match of the century; the same applies to events in the realm of arts or politics. Still, even if we make appropriate markdowns on account of our inclination to attribute highest importance to games in which we are players (or at least spectators), one cannot discount the fact that there have rarely been times in which the options would have been as open and as wide as nowadays. We may be on the threshold of Europe where people and states are not placed any more on the Procrustes beds of ideologies, and their main problem is not to decide which bed is the better one, and who is the favourite overnight guest of Procrustes. I am referring to the dream of a united Europe, which is just about to leave the empire of fantasy, and approaching to the domains of reality. At the same time, we are on the brink of new painful divisions and explosions which cannot be contained with the existing arsenal of instruments geared towards old partitions.

In this time of transition, legal rules are also changing. In Central and Eastern Europe the very foundations of a given legal structure have been questioned. This is a perilous juncture, because one cannot easily discard a whole set of rules and authorities, without endangering the very purpose and standing of legal rules *per se*. In the decades which are now behind us in Central and Eastern Europe, legal rules may have been perverted, yet they have never been completely abandoned. Even in situations in which interests incompatible with international law were pursued by brutal force—like the invasion against the Hungarian revolution in 1956, or against the Czechoslovak in spring, in 1968—there was an endeavour to offer a makeshift link to international rules of behaviour. It was argued that the invaders were *invited*. (Not much attention was paid, however, to the sequence. Instead of the traditional progression, meaning first the invitation, and then the visit, this time a somewhat unorthodox chronological order was adopted: First the visit—by tanks—and then the invitation!)

But what I really want to say is that while the visitors withdrew after having made an honest peace with the countries they left, executors of new merciless brutalities—this time on the Balkans—have forgotten law even as a pretext. The only recurring justification is the naked assertion that "I must be right since I belong to this (or that) nation".

The task which our profession is facing today is tremendous. Problems have emerged which defy preexisting patterns, which are even beyond our preexisting imagination. After Chernobil, international environmental law is not any more a matter of improving the quality of our life, it has become a matter of our bare survival. After the dissolution of the USSR and Yugoslavia, those colleagues who have been teaching state succession, international dispute settlement, international criminal law, human rights, or minority rights, they should not worry. Everything which was imaginable—or

unimaginable—every conceivable and inconceivable law/fact pattern became hard reality. Hypotheticals will not be needed for some decades to come.

In the sphere of economy and private international law, the challenges may be somewhat less dramatic, but their importance is tremendous. Within a short and turbulent period, company forms, patterns of property, and principles of civil law in Central and Eastern Europe have become essentially compatible with their counterparts in Western Europe. This happened later than many people wished, yet sooner than many hoped. It happened just in time to catch the last train towards the with integration in the West, before it becomes separation; if the train would make a stop at these stations at all. One has to remember that, at times when this region was under the strong grip of a totalitarian ideology, and when challenging walls, barbed wires or prescribed patterns of communication assumed real risk, attempts from this side to join the logic and the institutions of the other side were encouraged an applauded. One could only hope that the ending of the barriers will not bring about the ending of the encouragement. The reasons for this are not only of a moral nature. Our destinies have become so intertwined, that economic prosperity, or conflicts (or ecological disasters for that matter) cannot be contained on one part of Europe only.

A new unity—which may include the East-West axe as well—invites new legal precepts. In Private International Law, with more and more conflict rules above the level of individual states, we shall have to rediscover (and modernize) the dreams and principles of the statutists and other pre-Wächter scholars, who were engaged in a search for non-national guiding rule. In doing so, we must not forget that community conflict rules, choice-of-law rules of the Hague conventions, or other supranational sources of Private International Law, are still being applied first of all by municipal rather than by supranational courts. The same courts are in most cases dealing with new conflicts, those emerging between national legislation and the legislation of regional integrations like the EC; while decision-making authorities on the regional level are harbouring hardly disguised pretensions. The growing spirit of cooperation is also a temptation to change the borders of Private International Law—by relatively peaceful means. For centuries, national states were prepared to apply foreign law only if their own conflict rules would decide that foreign elements in the underlying legal relationship were dominant—and if the problems were rather remote from direct sovereign interests. For these reasons the playground of conflict rules did not extend beyond the confines of *private law.* Today, these borders have become contested. It has become increasingly difficult to improve discipline in international road, traffic, e.g. without applying the concepts of Private International Law on some domains of Administrative Law, and even Criminal Law. We have started to apply foreign administrative law, and we have started to recognize foreign decisions in administrative and criminal matters. We shall also have to be prepared for a new passionate round of our good old discussions about the fallacies of the term "Private International Law"; and fancy alternative terms will no doubt emerge again.

International Commercial Arbitration has become these days more important than ever—and more international than ever. After having sent such able vanguard outposts

as the 1923 Geneva Protocol and the 1927 Geneva Convention, the main thrust came with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and with the UNCITRAL Model Law. It remains to be seen whether the fact that commercial arbitration became truly international will also inspire the development of a fellow-problem, that of the recognition and enforcement of foreign court decisions, and whether after Brussels and Lugano, further frontiers will be conquered.

There are hardly any major obstacles which would impede harmonization in the realm of International Commercial Law. Principles which have been espoused throughout Europe have become more compatible than ever. What remains are the details; but of course, the real problems usually are in the details. The Vienna sales convention is gaining ground more or less evenly in all parts of Europe—and not only in Europe. There are many dilemmas pertaining its implementation, yet there are no reasons, not even plausible pretexts, which would obstruct the common efforts in solving these problems. Scholars and practitioners are equally needed in the shaping of the law of international trade, and our Association may and should play a prominent role in the building of a legal structure which would correspond to present economic currents. One should remember that the first name of our Association which it took in 1873, was: "Association for the Reform and Codification of the Law of Nations".

I would like to turn now to a problem which may be the most painful predicament of our time. The focal point of the quandary is in the question, how should international law respond to nationalism? A serious effort to find a solution was made after World War I, when nations became one of the organizing principles along with states, and with the postulate of minority protection. At that time—like today—one spoke of a "new world order", and magic was expected from these three words. The then-new world order was not uncontroversial. In the heart of the dispute was the rivalry between nation and nationalism (seen, both as a possible agent of devastation and as a necessary principle) on the one hand, and state on the other hand. This controversy never ended, it has only varied in its intensity. Legal rules were supposed to forge the right and viable compromise, but this task has not yet been performed. In our days, we are confronted again in a most dramatic way with the predicament of ethnicity, with majorities and minorities, and with the contest between sheer might and the authority of law. In this confrontation, the legal profession cannot draw much inspiration from success, yet we may be spurred by the desire to overcome failures and frustration.

It is true that today we may be on the threshold of an international settlement in Bosnia-Herzegovina. The circumstances of the possible resolution bring to my memory the lines of one of the great poets of our host country, János Arany. After one of the many bloody conflicts on the Balkans which took place century ago, and after one of the many international settlements (the Berlin Conference), Arany wrote a short poem entitled "Civilization". Reading it under the angle of the present Bosnian tragedy, I have translated it into English with much enthusiasm—probably more enthusiasm than competence. The poem reads:

"In wars of early times
principles were not heeded
the strong took from the week
whatever he wanted.
This was the past. Today, the World
is directed by Conference
and if the strong is mischievous
it convenes—and grants acquiescence".

I am coming from a country were the "strong" have had their ordeal. Acquiescence seems to be imminent. This will not help our cause, the cause of international law. The international community did put its authority at stake in the Yugoslavian crisis. Actions *were* taken, responsibility *was* assumed. Solutions and guiding principles were not only proposed, but *asserted.* The first asserted solution—that of maintaining the unity of Yugoslavia—was lightly abandoned. As a matter of fact, this principle may not have the strength of a moral imperative. Much more consequential were the pronouncements against territorial changes by force, and against ethnical cleaning. Solemn statements were made, that these practices will not be permitted. Here, we are dealing with the moral foundations of the post World War II and post cold-war order. At present, it seems that these principles have also been defeated. There is also room for doubt regarding the International Tribunal established by the UN Security Council for the prosecution of persons responsible for serious violations of international humanitarian law. Questions are being raised not so much with regard to the chances of this Tribunal to operate, to fulfil its mission, and to send the right message.

Ethnic turmoil is, of course, not novel or unique in history; and it is not the monopoly of this Region. What makes the present Central- and East-European situation so severe, is the fact that the events are taking place amid a sudden vanishing of precepts and standards prompted by the collapse of the whole architecture of the socialist-communist structures. The only persuasion ready to fill the emerging void in Yugoslavia (and elsewhere) was that of nationalism, which remained uniquely unbalanced under the given circumstances. The new creed inherited the mental coordinates of the one-party consciousness. The mindset that mandated an ostracism of dissidents and equated difference with treason, survived—and ethnic minorities fill now the same position that ideological dissidents did earlier. Minorities have found themselves outside the new trends, and even outside the logic of the new communities that have been taking shape. They have essentially become an encumbrance; a hindrance by their different culture, language, alphabet—or by their very existence. In the light of this sequence of events, the classic dilemma regarding *individual rights* and *collective rights* has gained new inspiration; and it seems that some protection of collective rights (in addition to individual rights) has become an unavoidable postulate. During the ongoing conflicts in the former Yugoslavia and in certain parts of the former Soviet Union, really or imaginary atrocities are being ascribed to ethnic colletives, and vengeance is also aimed at ethnic groups. Ethnic collectives have been

gaining control over disputed territories, and have been driving out other groups. As a result of ethnic cleaning millions have lost their homes, and dignity, hundreds of thousands lost their lifes. Even rape has become a device of ethnic fundamentalism. The bulk of refugees is seeking shelter in areas where they would belong to the majority, rather than the minority. At some distance from the actual armed conflicts, bilingual road signs, place names, and bilingual education which were earlier tolerated, or even mandated, are now becoming monolingual.

It is abundantly clear that the *targeted victims are precisely minority groups,* rather than citizens as individuals. *One cannot have a viable system of protection while ignoring the target of the attack.* The need for recognition of the collective dimension was acknowledged in very simple and persuasive terms by Justice Blackman of the United States Supreme Court, who stated: "In order to get beyond racism, we must first take account of race. There is no other way". In the former Yugoslavia today, Moslem-Slavs, Croats, Serbs, and others are being massacred and driven out from particular regions, exactly because they are Moslem-Slavs, Croats, or Serbs. The denial of minority schools, bilingual road signs or place-names can hardly be conceived but as an attitude and a gesture towards a *group, towards an ethnic collective.*

It has been said, and not without reason, that minorities are often oversensitive, that their fear may be out of proportion. In Bosnia, the realities have matched the wildest fears. Also, I would like to tell you the story of one of my colleague from Haifa he told me once about a graffiti. The words of the graffiti were: YOU MAY BE PARANOIC, BUT THIS DOES NOT MEAN THAT THEY ARE NOT AFTER YOU!

The civilized solution to the problem which has been plaguing us is relatively simple. Human rights should be guaranteed to members of all ethnic groups, and the right to foster a language, tradition and culture, should not be restricted to the majority only. This implies appropriate forms of self-organization. There is no reason or justification whatsoever, for imposing the renouncement of one's identity as a condition for living in a larger community. Minorities should be offered full opportunity to affirm their identity within the state to which they belong, rather than forcing them to link their hopes with change of borders. The loyalty of the minorities is in a direct proportion to the rights granted to them.

Within the past several years ethnic conflicts have not been solved along these lines. Brutal force has taken precedence over principles; and the international community—although better organized than ever—has not been able to offer more than promises, protest, and then acquiescence. If—after all what has been said, done, or not-done—statesmen can still remain statesmen, this will be due to one crucial factor—and that is *short memory.*

What are the lessons to be drawn, and what hopes can we cherish regarding the impact of international law on the transformation of Europe?

One of the possible options is to side with many whose horizons are enwrapped with national symbols, and to serve the cause of ethnic fundamentalism, like two medical doctors from my home country who were ardently engaged in a public debate

pertaining to the big issue whether cyrillic letters or latin letters were better for the eye.

The other option is a more naive one. It implies a continued belief in international law, and continued efforts to make it more efficient, and to raise the price of non-observance. And we can find encouragement in the wonderful short story of Thomas Mann, *Das Gesetz* (translated into English as "The Tables of the Law"). This is the story of Moses who wrote the law. He failed the first time, but he returned to the mountain, scraped and chiseled the stones, painted the letters with his blood, and descended once again, with the law under his arms. Then he said to his people (and I am quoting Thomas Mann):

"I know well and God knows in advance that his commandments will not be obeyed, and they will be transgressed at all times and everywhere. But at least the heart of everyone who breaks them shall turn icy, for the words are written in everyman's flesh and blood and deep within himself he knows that the words are all-valid."

If even divine commandments will not loose sense if they are not followed always and by everyone, the same should hold true in respect of human rules. Law—and international law in particular—create a web of social and psychological motivations and deterrents. These help us to reach a better compromise with our own imperfections.

The point I want to make is that in the domain of international law, *idealism may be more practical than realism.*

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Europe and the International Court of Justice: Choice of Alternatives

I. Introduction

1. Ladies and Gentlemen, I must say at the outset that I am very honoured to be part of this gathering here today, and that I am looking forward very much to hearing the comments of our distinguished Director of Studies and to the discussion that is to follow. We are here to participate in the First European Regional Conference of the ILA. While the First Regional Conference speaks for itself, the word here that is really so novel, of course, is European, not Western or Eastern, but European. And the topic of this session today is conflict resolution, old and new methods, more particularly at this moment, using the International Court of Justice (ICJ) as one method of dispute settlement. And perhaps we may say that the ICJ is at the present time novel in its way too, coming into, or experiencing, a period that can almost be described as over-utilization.

2. Not only is there an intense activity in the work of the International Court, there is also a very intense discussion among international lawyers on the use of the International Court, often in connection with a discussion on the use of arbitration. One of the very latest manifestations of this is the Spring Issue, 1993, of the Leiden Journal of International Law, devoted to the topic of international arbitration. In three of the articles, at least, adjudication by the ICJ is considered alongside arbitration. Here I confine myself to some remarks on innovations in the use of the ICJ, on Europe and international adjudication, and these two topics combined.

II. The International Court of Justice

3. Just over two years ago eleven contentious cases were pending before the ICJ. Four of these have been discontinued: Nicaragua discontinued its proceedings against both the United States and Honduras by letters dated 12 September 1991 and 11 May 1992 respectively; Finland and Denmark notified the Court of their settlement of the *case Concerning Passage Through the Great Belt* out of Court by letters dated 3 and 4 September 1992 respectively; by a joint letter filed in the Registry of the Court on 9 September 1993, the Agents of Nauru and Australia similarly discontinued their proceedings concerning Ceratin Phosphate Lands in Nauru. Three cases have proceeded to Judgment: for Guinea-Bissau v. Senegal on 12 November 1991; for El Salvador v. Honduras on 11 September 1992, in a special chamber procedure; and for Denmark v. Norway on 14 June 1993. But as six new contentious cases have been brought before the Court, the number of cases in its docket remains ten,[1] and there must be added the request for Advisory Opinion made by the World Health Organization, contained in a letter dated 27 August, 1993, from the Director-General of the Organization. This is the first request for an advisory opinion since 1989, when the Court handed down its Opinion *concerning Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations* on 15 December of that year. This number may be compared with the total of fifty-two Judgments and twenty-one Advisory Opinions given by the Court between 1946 and June 1991.

4. Bearing in mind the fact that the International Court itself always comes to its decisions in plenary session, with the participation of all 15, or possibly 17, Judges, unless requested by the parties to a case to form a special chamber in accordance with Article 26, Paragraph 2, procedure,[2] this list of cases surely indicates that the ICJ is taking an active part in the resolution of inter-State disputes. For it remains a Court in which States only have standing (Article 34 of its Statute). Furthermore, not one of these cases now pending is one in which a State party is espousing the claim of its national,

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1 The six new proceedings are: two separate Applications filed by Libya on 3 March 1992 instituting proceedings against the USA and the UK respectively on the basis of the Montreal Convention for the suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; the joint notification by Hungary and Slovakia to the Registrar of the Court of the Special Agreement signed at Brussels on 7 April 1993 concerning the Construction and Operation of the Gabcikovo-Nagymaros Barrage System and on the construction and operation of the "provisional solution"; Iran's Application filed on 2 November 1992 instituting proceedings against the USA with respect to the destruction of Iranian oil platform, based on a treaty of 1955; proceedings instituted by Bosnia and Herzegovina on 20 March 1993 against Yugoslavia (Serbia and Montenegro) for violating the Genocide Convention; and the proceedings instituted by the State of Qatar against the State of Bahrain of 8 July 1991 concerning Maritime Delimitation and Territorial Questions between the two States. Hearings on this last case are to open on 28 February 1994.

2 Article 26 (2) of the statute of the Court provides:

"The Court may at any time form a Chamber for dealing with a particular case. The number of judges to constitute such a chamber shall be determined by the Court with the approval of the parties. (3) Cases shall be heard and determined by the chambers provided for in this article if the parties so request."

on the basis of diplomatic protection, as did Greece for its national, in the *Mavrommatis Palestine Concessions* case before the Permanent Court.[3] As has been pointed out elsewhere, Mr Mavrommatis would now, in contrast to the position in the early 1920's, have a variety of options for pursuing his claims: the International Center for the Settlement of Investment Disputes of the World Bank (ICSID) in Washington or the International Chamber of Commerce in Paris in particular.[4] Not that this means that the issues in an inter-State dispute are always clearly linked to the States parties to the case. In the *Case Concerning East Timor,* brought by Portugal against Australia on 22 February 1991, the matter at issue rests on the legality of Indonesia's annexation of East Timor.

5. Being a court for States, with a jurisdiction dependent on the consent of States, there is otherwise no limit on the subject-matter of the issues to be adjudicated, provided that the dispute can be formulated in legal terms. States can themselves choose the method of dispute settlement, and for this the last decade has been a fruitful period for innovations in the way the ICJ may be used by States. I shall take three examples.

6. The *Gulf of Maine* case was the first case to be submitted to a Chamber of the Court pursuant to Article 26, Paragraph 2, and Article 31 of the Statute of the Court. This was effected by an Agreement between the parties, Canada and the United States, transmitted to the Court by a joint letter dated 25 November 1981. It will be recalled that two changes, in the Statute and the Rules, made this procedure attractive to States. Article 26 (2) of the Statute of the ICJ is new and was lacking in the Statute of the Permanent Court. It embodies two changes of considerable importance: the parties to a case may themselves request the formation of a special chamber, and the decision as to the number of judges to constitute such a chamber is to be determined by the Court "with the approval of the parties" and not, as during the time of the Permanent Court, "with due regard to the provisions of Article 9".

7. The revised Rules of Court of 1978 clarified the procedure to be followed under Article 26 (2) of the Statute in allowing for an increased control over the composition of the Chamber by the parties themselves. So under Article 17, Paragraph 2, of the present Rules "When the parties have agreed" on a request for the formation of a Chamber to deal with a particular case "the President shall ascertain their views regarding the composition of the Chamber, and shall report to the Court accordingly". Paragraph 3 of Article 17 continues: "When the Court has determined, with the approval of the parties, the number of its Members who are to constitute the Chamber, it shall proceed to their election..." Article 26, Paragraph 1, of the 1972 Rules provided for greater control by the Court of the composition of the Chamber, with the wording: "When the Court... decides, at the request of the parties, to form a Chamber to deal with a particular case". To complete this picture of a special chamber composed of judges of the Parties' choosing,

3 Mavrommatis Palestine Concessions case, 1924. PCIJ Ser. A, no. 2.

4 WERNER, J.: "Interstate Political Arbitration: What Lies Next?" in 9 J. Int'l Arb. (1992) p. 74.

Article 17 (2) of the Rules provides for the appointment of *ad hoc* judges [(Article 31 (4)], who need not, of course, be members of the Court.

8. Lastly, for the way in which the parties to this case ensured their choice of judges, we must look at the way the Gulf of Maine Boundary Treaty Dispute Settlement Treaty was formulated. The Treaty consisted of four articles. Two agreements relating to the submission of the dispute to a chamber of the ICJ or an *ad hoc* Court of Arbitration are annexed to the Treaty. Article I of the Treaty reflects the Parties' agreement to submit the dispute to a Chamber of the ICJ on the terms set out in the Special Agreement annexed to the Treaty. Article II provides that if a Chamber of the ICJ is not constituted in accordance with the Special Agreement by the end of six months following the entry into force of the Treaty, either Party may terminate the Special Agreement where-upon the Arbitration Agreement, also annexed to the Treaty, automatically enters into force. Article III further provides that either Party may terminate the Special Agreement if a vacancy on the Chamber is not filled to the satisfaction of the Parties. In that case also the Arbitration Agreement automatically enters into force.[5] This procedure was accepted by the Court, and three more cases have since that been submitted to a Chamber of the Court.[6] A judgment rendered by a Chamber has the same status as a judgment of the full Court. This illustrates how States, prompted by international lawyers—the name here of the late Judge Jessup comes immediately to mind—can be innovative within the constitutional framework of the Court in the manner in which they can institute proceedings.

9. Further, this case has very interesting consequences for the future of international adjudication and arbitration, with the blurring of the differences between the two methods of dispute settlement.

10. For other innovative uses of the International Court, we may look at compromissory clauses in treaties. Recently attention has been drawn to so-called advisory compromissory clauses. These are clauses contained in treaties entered into between States and international organizations, where provision is made for the request for advisory opinion, to be considered binding by the parties to a dispute as to the interpretation or application of the treaty. The legality of such a provision was challenged in 1956, in the Court's Opinion on *Judgments of the Administrative Tribunal of the ILO upon complaints made against UNESCO*,[7] on the ground that under this procedure the International Court would be acting as Court of Appeal, but the Court dismissed the argument and stated in general terms that "the fact that the Opinion of the Court is

5 Letter of Submittal, Dept. of State to the President, April 18, 1979, reproduced in 20 ILM 1374 (1981). Also Judge Oda's Declaration in the Land, Island and Maritime Frontier Dispute case, Order of 8 May 1987, ICJ Reports 1987, p. 13.

6 Case Concerning the Frontier Dispute between Burkina Faso and Mali, ICJ Reports 1985, p. 6; the Elettronica Sicula S.p. A. (ELSI) case between the United States and Italy, ICJ Reports 1987, p. 3; and the Land, Maritime Frontier Dispute between El Salvador and Honduras, ICJ Reports 1987, p. 10.

7 ICJ Reports 1956, p. 84.

accepted as binding provides no reason why the Request for an Opinion should not be complied with".

11. In the Opinion on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Order of 9 March 1988*,[8] the Court acceded to the request for an advisory opinion put to it by the General Assembly of the UN concerning a disagreement of substance with the United States, on the question (only) of whether the United States, as a party to the Agreement between the UN and the USA regarding the Headquarters of the UN, is under an obligation to enter into arbitration in accordance with Section 21 of the Agreement? Section 21 of this Agreement provided that any dispute between the United Nations and the USA regarding the interpretation or application of the Agreement or any supplemental Agreement should be settled by negotiation, failing this, it shall be referred for final decision to a tribunal of three arbitrators. The Secretary-General or the United States was permitted to ask ("may" do so) the General Assembly to request of the ICJ an advisory opinion on any legal question arising in the course of such proceedings. Thereafter "the arbitral tribunal shall render a final decision, having regard to the opinion of the Court". This was thus a way, again, in which the Court's jurisdiction, here the advisory jurisdiction, was used in conjunction with arbitral proceedings.

12. The Opinion also clarified or demonstrated certain matters connected with this procedure. Thus, while the Court cannot indicate provisional measures in advisory proceedings, there is no requirement of the prior exhaustion of local remedies. And by the modification of Article 103 in the 1978 Rules, the body authorized by or in accordance with the Charter to request an advisory opinion, or the Court itself, may refer to the urgency of the matter. Thus this Opinion on the Headquarters Agreement was rendered just seven weeks and one day after the letter addressed by the Secretary-General of the UN to the President of the Court, containing the formal communication of the General Assembly's request for an opinion, was received and filed in the Registry of the Court.

The other change in the present Article 103 of the Rules is the insertion of an undertaking by the Court to convene specially when such a request is made, if it is not then in session.[9] Without comparing this with the length of earlier opinions of the Court—after all, the *Namibia* Opinion,[10] where the proceedings lasted almost one year, involved far more complex issues—this procedure is nevertheless of interest for parties looking for an authoritative statement on a legal point at issue within a reasonable, or even short, period of time.

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8 ICJ Reports 1988, p. 3, pursuant to resolution 42/229 B of 2 March 1988 of the General Assembly of the United Nations. This Opinion concerned the disagreement between the United Nations and the United States over the United States Anti-Terrorism Act of 1987 and its application to the Permanent Observer Mission of the Palestine Liberation Organization to the United Nations.

9 ROSENNE, S.: Procedure in the International Court (1983) p. 216.

10 Id. The Namibia Opinion was given at the request of the Security Council by resolution 284 of 29 July 1970 and rendered on 21 June 1971.

13. The drafting of compromissory clauses in treaties is negotiable as any other clause in a treaty, and the wording thus may differ. One such clause contained in two recent United Nations Conventions, on Environmental Impact Assessment in a Transboundary Context, 1991,[11] and on the Protection and Use of Transboundary Watercourses and International Lakes, 1992,[12] provides for the settlement of disputes concerning the interpretation or application of the Convention by negotiation or other means of dispute settlement agreed upon by the parties to the dispute. Alternatively, when accepting the Convention a party may declare in advance that it accepts submission of the dispute to the ICJ or to arbitration in accordance with the procedure set out in Annex IV to the Convention or to both. If both means of dispute settlement have been accepted, and the parties have not agreed otherwise, the dispute may be referred only to the ICJ. This is of interest in that adjudication by the Court takes precedence over arbitration where no express choice is made. But it is otherwise an example of a regrettable practice of separating a declaration accepting the jurisdiction of the Court for the settlement of disputes arising out of it from the text of the Treaty itself.

14. Thirdly, I want to refer here to the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice, announced by him to the General Assembly on November 1, 1989.[13] The financial assets of the Fund are to be based entirely on voluntary financial contributions from outside the United Nations Organization, but it otherwise functions in close connection with the UN and under the surveillance of the Secretary-General himself. The Financial Regulations and Rules of the United Nations apply to the administration of the Trust Fund, including the auditing procedures provided for therein. By 25 October 1991 some thirty States from all regions of the world had made financial contributions to the Fund. In May 1991 an award was made to a developing country seeking a solution to a dispute with its neighbour through the ICJ. A second application, also from a developing country, was still pending at that time.[14]

15. This Trust Fund, as an independent source of legal aid for poor litigant countries, is of great significance for the future of the International Court. One point must be noted, however. In Paragraph 6 of the "Terms of Reference etc." of the Fund, the object and purpose of the Fund are more narrowly expressed to be to provide "financial assistance to States for expenses incurred in connexion with: (i) a dispute submitted to the ICJ by way of a special agreement, or (ii) the execution of a Judgment of the Court resulting from such special agreement". Proceedings based on the compulsory jurisdiction of the Court are thus excluded.

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11 30 ILM 800 (1991), Article 15.

12 31 ILM 1312 (1992), Article 22.

13 28 ILM 1589 (1989), entitled "Terms of Reference, Guidelines and Rules of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes Thought the ICJ". DONNER, R.: "Recent Developments in the Work of the ICJ" II FYBIL (1991) pp. 357-360.

14 Information Note added to the January 1992 issue of the ICLQ.

III. Europe and the ICJ

16. My remarks on Europe and the ICJ will be confined to the three major regional organizations or groupings in Europe: the Council of Europe, the Conference on Security and Cooperation in Europe (CSCE) and the European Community. The attitude of the individual States of Europe to the ICJ are thus only included incidentally.

17. Some definition of the term Europe, however, may be in order. The Council of Europe undertook to do this during the meeting on 21 April 1992 between the Ad Hoc Committee on the Revision of the Statute and a delegation of the Ministers' Deputies. With the geographical enlargement of the Council of Europe a clear policy was needed as to what is "European".[15] It was noted that unless one day the meaning of the term were to be extended to the southern and south eastern shores of the Mediterranean (an idea occasionally put forward) this problem concerns only the former Republics of the Soviet Union. The conclusion reached was that the three Baltic Republics of Estonia, Latvia and Lithuania, as well as the other European Republics of Russia, i.e. Belarus, Moldova and Ukraine, were obviously "European". On the other hand, the qualification "European" would be difficult to accept for the five Asian Republics, Kazakhstan, Kirgizia, Tadzhikistan, Turkmenistan and Uzbekistan. The discussions in the Bureau were not entirely conclusive as to whether the Caucasian Republics of Armenia, Azerbaidjan and Georgia should be considered European.

18. To take the Council of Europe first. The Statute of the Council contains no provision for the peaceful settlement of disputes, out of consideration of the Members' participation in the United Nations. However, the European Convention for the Peaceful Settlement of Disputes of 29 April 1957,[16] was drafted within the Council of Europe, not as a legislative act, but in the form of an international treaty, albeit restricted to the Members of the Council of Europe. In the latest European Yearbook, the number of States parties as of 4 May 1992 was thirteen out of the total of twenty-six.[17] This Convention follows closely the wording of the Geneva General Act of 1928. Basically, it divides all disputes into two classes. International legal disputes are to be submitted by the parties to the ICJ for compulsory adjudication, Chapter I, Article 1, containing a list of disputes as in Article 36 (2) of the Statute. The parties to a dispute may resort to the procedure of conciliation before that of judicial settlement. All other disputes are to be submitted to compulsory conciliation unless the parties to a dispute agree to submit it to arbitration.

19. This Convention has served as the basis for jurisdiction in only one case before the ICJ, the *North Sea Continental Shelf* case,[18] for the reason there that the Federal Republic of Germany was not at that time a Member of the United Nations, and hence

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15 HRLJ, 30 June 1992. Vol. 13, 1992, p. 231.

16 Text in 320 UNTS pp. 243-267, and in the ETS, No. 23. The Convention entered into force on April 30 1958.

17 Austria, Belgium, Denmark, Germany, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Sweden, Switzerland and the United Kingdom.

18 ICJ Reports 1969, p. 3.

not a party to the Court, although this could otherwise have been effected in accordance with the United Nations Security Council Resolution of 15 October 1946, providing for the submission of a case to the ICJ by non-Members by way of a general or special declaration. Miehsler suggested some years ago that the Convention may have influenced the course of negotiations, such as on the Rhine pollution between the Federal Republic of Germany and Switzerland.[19] I would suggest that the division of disputes into justiciable and non-justiciable, on which the Convention is premised, is not only now outdated, but also perhaps even counter-productive in that it assumes non-justiciable disputes.

20. Treaties concluded under the aegis of the Council of Europe do not as a general rule contain compromissory clauses providing for the compulsory jurisdiction of the International Court. On the contrary, they may contain clauses providing for adjudication (in the broad sense) by way of arbitration, as in the European Convention on the Suppression of Terrorism (Article 1), or provide for other preliminary methods of friendly settlement, as in the European Convention on Extradition (Protocol I, Article 7 and Protocol II, Article 10) or by the establishment of a European tribunal consisting of the members of the European Court of Human Rights, as in the Additional Protocol to the European Convention on State Immunity (Article 4). These provisions on the other hand have the effect of reducing the right of the Contracting States to take a case to the International Court, because by Article 28 of the 1957 Convention recourse to other methods of friendly settlement has the effect of excluding application of the Convention. Add to this that by Article 28 disputes in connection with the European Convention on Human Rights are expressly outside the sphere of application of the Convention. Even with the enlarged Council of Europe membership, one may doubt the usefulness of this convention.

21. With the CSCE process two documents are of relevance. First, there is the Report of the CSCE Meeting of Experts on Peaceful Settlement of Disputes adopted at Valletta on 8 February 1991.[20] Here references to the ICJ are only hortatory. States are to consider accepting the compulsory jurisdiction of the ICJ either by treaty or by a declaration under Article 36, Paragraph 2, of the Statute or by submitting disputes by special agreement to the ICJ, or resort to arbitration. The proposed CSCE Dispute Settlement Mechanism is to be established in a manner reminiscent of the Permanent Court of Arbitration as established in 1907 but it provides a form of good offices for the purpose of selecting an appropriate method of peaceful settlement. The services of the Permanent Court of Arbitration are expressly mentioned in Section VI, Article 3. No mention is made of the ICJ. Recourse was had to the Mechanism in June 1991 for Yugoslavia, without success.

22. The Concluding Document from the Fourth Follow-Up Meeting of the CSCE, held in Helsinki in July 1992, contains the Summit Declaration and the Decisions. No

19 In "Liber Amicorum pour Friedrich August Freiherr von der Heydte." (1977).
20 30 ILM 382 (1991).

reference is made to the ICJ, although the Conference was of the opinion that "the participating States consider their commitment to settle disputes among themselves by peaceful means to form a cornerstone of the CSCE process".[21] The Conference is continuing its work on the establishment of a conciliation and arbitration court within the CSCE, on enhancing the Valletta Mechanism and on establishing a CSCE procedure for conciliation, including directed conciliation, where any two participating States have not been able to settle a dispute within a reasonable period of time.

23. Thus the participating States in the CSCE process would not appear to consider that the ICJ has a contribution to make within an area that includes the whole of the former Soviet Union and Yugoslavia.

24. Lastly, the European Community. Here it is without doubt unthinkable that a Member of the Community would institute proceedings against another Member State before the ICJ. Even Article 170 EEC procedure, providing for cases brought by State against State has been used only once.[22] The Community is a closed system; Article 219 of the EEC Treaty provides that the Court of Justice is the only court given jurisdiction to hear disputes between Member States concerning the interpretation or application of the Treaty.

25. There are limits, however, on the jurisdiction of the ECJ, it being a court of attribution. Article 31 of the Single European Act, 1986, excludes the powers of the Court of Justice to review the legality of the exercise of any of the provisions contained in Part III of the Treaty, relating to European Political Cooperation. Thus while a start has been made to institutionalizing the European Council, neither the European Council nor the European Political Cooperation procedures are subject to review by the Court.[23] When confronted with the breakdown of the former Yugoslavia and the conflicting views of Member States as regards recognition of the break-away Republics, the European Community and its Member States agreed in a declaration at a meeting held in Brussels on 27 August 1991, to convene a peace conference on Yugoslavia and to establish an Arbitration Commission, the Badinter Commission. This commission has issued ten opinions and no awards so far. By the terms of the EC Declaration the Commission was requested to give its decisions within two months of being requested to act. Opinions 4 to 7 were delivered in less than one month.[24]

IV. Europe and the ICJ: Suggestions for Use

26. How, then, can the ICJ be of greater use for these three European bodies, one a hybrid union, another a treaty-based organization and the third a "process"?

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21 31 ILM 1385 (1992) at p. 1402.

22 Case 141/78 France v. U. K. (1979) ECR 2923.

23 Freestone and Davidson, "Community Competence and Part III of the Single European Act" 23 CMLREV. (1986) 793-801. This is not altered by the provisions of the Maastricht Treaty. [Add: Comment by Lord Slynn?]

24 31 ILM 1488 (1992).

27. A chamber for regional disputes is one possibility, either under the procedure laid down in Article 26, Paragraph 1, for particular categories of cases, or perhaps even the chamber of summary procedure, pursuant to the provisions of Article 29. For many reasons, however, this possibility of a regional court, or chamber, finds little support. Already the Report of the Informal Inter-Allied Committee on the Future of the PCIJ, 1944, made no recommendation on the two proposals given for regional Chambers.[25] The Council of Europe, as noted above, decided against a regional tribunal. As the President of the Court, Sir Robert Jennings, pointed out at the Hague Academy Workshop on the Peaceful Settlement of International Disputes in Europe, held in 1990, the "World Court" is also necessarily a regional court, and while the law applied by the Court is international or universal the Court can and does take note of relevant regional variations or special notes, as in the *Asylum* and the *Frontier Dispute* between Burkina Faso and Mali. Also, there may be difficulty in deciding where Europe ends. The CSCE process is, after all, a European-Asian-American framework of cooperation. On the other hand, the International Court has recently changed its attitude to the formation of a standing special chamber to deal with environmental matters, under Article 26 (1) of its Statute. Whereas in the past it had on occasion considered such a chamber to be unnecessary, emphasizing that it was able to respond rapidly to requests for the constitution of a so-called "*ad hoc*" Chamber, pursuant to Article 26, Paragraph 2 of the Statute—as discussed above—with competence to deal with any environmental case, it has now decided to form a seven-member Chamber for Environmental Matters. This was carried out not only for the reason that two of the eleven cases on the docket of the Court in July 1993 had important implications for international law on matters relating to the environment, but also in view of the developments in the field of environmental law and protection which have taken place in the last few years. The Members of the Chamber entered upon their duties on 6 August 1993.[26] Whether or not resort will be had to this special standing Chamber may be of great significance for future developments. After all, Article 26, Paragraph 1 refers to "particular categories of cases", which could include regional ones, and the two examples given in the text, of labour cases and cases relating to transit and communications, have in common only the fact that they were topical when the Statute was drafted in 1920, whereas environmental law is a developing branch of international law.

28. Secondly, compromissory clauses of a truly compulsory kind are always to be encouraged. In this way disputes arising out of the treaty relations of States may be settled by a binding decision concerning their interpretation or application. Here the new policy of the Soviet Union to recognize the binding jurisdiction of the ICJ in respect of a number of human rights treaties, which was announced by Mr Gorbachev in his address to the United Nations on 7 December 1988, does indeed give new hope for the legal

25 39 AJIl (1945) Suppl. of Docs, 1-42.

26 ICJ Unofficial Communique 93/20. The two cases are brought by Nauru against Australia and Hungary against Slovakia.

society of nations. The long-standing policy of Eastern Europe now abandoned was not to recognize the compulsory jurisdiction of the ICJ as embodied in compromissory clauses in treaties any more than in declarations under the optional clause. One argument which was put forward in the International Law Commission was that the majority of States would not accept conventions on substantive law containing such procedural provisions. Hence the drafting technique of providing for separate declarations of acceptance of the Court, noted above. One may hope that his argument will be abandoned.

29. If jurisdictional clauses are to be inserted in treaties the variety of possibilities must be stressed. For it is possible not only to require a settlement by negotiation first. There can also be combinations of conciliation or arbitration or adjudication by the Court. This raises another long-standing question: can the Court be considered as a Court of Appeal?[27] It is certainly an interesting point, because a judicial system with no procedures for appeal—apart from the statutory incidental jurisdiction for interpretation or revision under Articles 60 and 61 of the Statute—is in the nature of what Judge Andrè Donner in his 1966 Rosenthal Lectures indirectly referred to as "judicial roulette". But the Court, as it has reiterated on a number of occasions is not a Court of Appeal. The PCIJ had three instances of appeal from a Mixed Arbitral Tribunal and there is the Appeal Relating to the Jurisdiction of the ICAO Council case between India and Pakistan, which constituted a form of appeal from a decision of the ICAO Council. In general, and here I refer to Rosenne's recent article on the ICJ and international arbitration,[28] the Court has been meticulous to maintain the integrity of the arbitral as well as of its own judicial process, and is reluctant to do other than uphold an impugned decision, as in the Judgment of 12 November 1991 in the *Case concerning the Arbitral Award of 31 July 1989*.[29]

30. If arbitration and adjudication are on a par, why choose adjudication by the Court? Judge Lachs suggested the greater security of the result.[30] Here there is the authority of the World Court and of Article 94 of the Charter, providing only that decisions of the ICJ will in the last resort be enforced by the United Nations Security Council. And as Judge Jennings has written the authority of the International Court stems also from the fact that it is a World Court in the composition of its members.[31] Professor Pellet has suggested that a European Court of settlement and arbitration is today absolutely necessary. While agreeing entirely with this one may question one reason that he gives for entrusting the task of deciding on frontier changes to an arbitral tribunal: that it could be inspired by equity or by general norms reflecting the States'

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27 See e.g., LAUTERPACHT, E.: Aspects of the Administration of International Justice (1991) pp. 99-116.

28 Leiden J. Int'l Law, Spring Issue 1993, p. 53.

29 Guinea-Bissau v. Senegal, ICJ Reports 1991, p. 53

30 In "International arbitration: Past and Prospects" (ed. A. H. A. Soons, 1990), p. 48. Contra I. Brownlie, p. 59.

31 "The Opinions of the Baditer Arbitration Committee. A Second Breath for the Self-Determination of Peoples". 3 EJIL (1992) p. 181.

common agreement.[32] Could not that function be entrusted to the ICJ just as well? I refer here to the application of equity *infra legem*, requested by Mali in the *Frontier Dispute* between itself and Burkina Faso. In its Judgment in 1986 the Chamber of the Court stated that it "will have regard to equity *infra legem*, that is, that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes...". And it cited an earlier decision of the Court to the effect that it will find an equitable solution derived from the applicable law.[33]

31. This application of equity *infra legem* applies equally well to proceedings brought by special agreement. Perhaps even more so, because the Court is bound by the agreement, or compromise, for its jurisdiction. Why could the CSCE Mechanism not be used for a form of compulsory negotiation leading to such an agreement? Or perhaps link such an agreement with the proposed directed conciliation. The failure of Iran and Iraq to agree on the formulation of such a compromise, with the subsequent ten-year war, is a haunting reminder of the necessity to agree. Here, too, the Secretary-General's Trust Fund is a further incentive for use of the ICJ.

32. If third-party settlement is not wanted, then the Court's advisory procedure may be very relevant. Take the example of the dispute between the Russian Federation and the respective Baltic States over the nationality (citizenship) of ethnic Russians resident in those States. A request for an advisory opinion could be framed in the form of a question as to the right to a certain nationality. The Inter-American Court of Human Rights has already touched on this question.[34] And as regards the Court's advisory jurisdiction in general, we know that it compares well with that of other tribunals where speed is of the essence.

33. Here I may refer to the intriguing Article 32 (3) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted on 19 December 1988.[35]

It provides that regional economic integration organizations which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention may, through a State Member of the United Nations, request an advisory opinion of the ICJ in accordance with article 65 of the Statute of the Court, which opinion shall be regarded as decisive. The precondition is that the dispute cannot be settled by negotiation, enquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice. Is this not an indication that the European Community could request advisory opinions, subject to the requirements of Article 96 of the Charter? Perhaps through the Secretariat of the European Council in Brussels.

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32 59 BYIL (1988) pp. 31-47.

33 ICJ Reports 1986, p. 544, paragraph 28.

34 Amendments to the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion of Jan. 19, 1984. No. OC-4/84 5 HRLJ (1984) p. 161.

35 28 ILM 493 (1989).

34. You will have noted that I have not mentioned the compulsory jurisdiction of the Court as accepted in declarations deposited under the optional clause, Article 36, Paragraph 2, of the Statute. Perhaps this is partly because I consider there is a certain unfairness involved in the limits on reciprocity as regards the duration of such declarations. But here it is rather a question of there being little choice involved, apart from the initial decision to deposit a declaration. Or the choice exercised is of a rather negative kind, as shown in reservations. By accepting the jurisdiction of the Court by special agreement, by requesting an advisory opinion, by inserting true compromissory clauses in treaties, States may exercise choice in other ways. This is all not to belittle in any way the declarations deposited by Poland on 25 September 1990 and Spain on 29 October 1990. A number of cases now before the Court are based on optional clause declarations,[36] and the fact that three such cases have recently been discontinued after settlement out of court is an interesting comment on the value of the Court as a mediator.

35. In conclusion, the President of the International Court may be empowered in a treaty to appoint arbitrators. Also, the composition of the ICJ itself is the end result of nominations from the States of the international community.

36 Sir Robert Jennings, President of the ICJ, has stated: "This new busyness of the Court has also coincided with a reversal of the former decline in the number of declarations accepting the compulsory jurisdiction of the Court under Article 36, paragraph 2 of its the so-called 'optional clause'. Indeed, the Court at the moment is seized of six cases brought by unilateral application under that clause: or some treaty jurisdiction clause". "An Expanding Court", in The World Today, March 1992, p. 44.

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The International Regulatory Environment and Appropriate Instruments of Investment Finance in the Reform Countries and EC Law

1. Introduction

Following the disbandment of the CMEA, the economic activity in Eastern Europe and the former Soviet Republics diminished significantly. This was due to the related trade gap on one hand and to the collapse of the central planning systems on the other hand. Meanwhile, the contraction of the industrial output has stopped in the Czech Republic, Hungary, Poland and the Slovak Republic, whereas the situation in the former Soviet Republics has continued to deteriorate.

From the point of view of indebtedness, an immediate danger for the world financial system is not visible. The main concerns are structural weaknesses rather than typical debt problems. Therefore, debt reducing operations which have been successfully implemented with several middle income countries in the Western Hemisphere or governmental deficit spending would not help. As a market-oriented system is not yet fully workable, the multipliers which could initiate a self- supporting upswing are not yet in force. In this situation, financing the stabilization of the economic environment is necessary, under condition of internal reform programs, and along with supporting projects which are appropriate to make up for the existing trade gap through export income streams.

With regard to facilitating the stabilization of the economic environment, programs are supplied by the IMF, the World Bank, the EC, the EBRD, and the G-10 countries. However, on a long-term basis private capital is necessary. Therefore, incentives for banks and other private capital providers will have to be project and/or trade-related. Attracting foreign capital, enhanced trade and project financing will be the key factors

of success at the early stages, probably in the shape of co-lending with international institutions rather than balance-of-payments credits. The AID programme for Polish housing projects may serve as an example. Here, private hard currency loans to a public-owned Polish institution are guaranteed by the US government, backed by the Polish government. These funds are then passed on in local currency to Polish commercial banks serving as final lenders. The currency risk is covered by the Polish government. Following increasing reform progress, bond and equity finance in the course of re-entering the international capital markets, initially by means of securitization and using collateral and enhancement methods, will be appropriate. Apart from that, foreign-exchange regulation should allow debt service for investment loans to be paid in foreign exchange out of related currency income streams. This would be neutral with regard to exchange rate control and enable specific foreign investments such as accommodation for foreign employees to be self-financing.

As the country exposure of private external lenders will be limited due to transfer (country) risks, a permanent flow of domestic capital will be necessary to secure investments. On the long run, in the interest of attracting foreign capital freedom of capital movements following the example of the EC Directive of 26 June 1988[1] is desirable. This framework could still provide for safeguard measures on capital movements and payments within national competence. In case of joining monetary unions, transitory exemptions would be possible, as was the case with new EC members. As long as balance of payments and monetary stability require more control, the basic freedom of capital movements could be introduced under condition of a list of non-liberalized transactions following the example of former EC capital movements Directives.[2] Such treatment might reduce unnecessary bureaucratic efforts.

2. *Capital Needs*

Following the collapse of the central planning systems with their allocation failures, an immense demand for capital in the reform countries exists. These capital needs are created by privatisation programs:

1. refurbishment of restituted properties;
2. investment in small and medium-sized businesses;
3. sale of large enterprises.

Covering the gap in the infrastructure of local governments will also absorb significant capital amounts. Furthermore, an adequate supply of affordable housing is a major concern. The emerging building industry may well prove to be a motor of economic growth providing for multipliers which could initiate a self-supporting upswing of the domestic economy.

A permanent flow of long-term capital will be necessary to secure investments:

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1 EC OJ 1988, L 178.

2 EC OJ 1960, L 43/921 and 1962, L 9/62.

1. Fixed assets such as property, equipment etc. must be financed. Under condition of a stable financial system this will be only possible on a long-term basis matching the cash flow of debt service by the return on investment.

2. This is particularly true for infrastructural measures because of the related slow return on investment.

3. Environment for Raising Long-term Capital

How to raise long-term capital? Participating in the international capital markets is certainly important. However, only part of the capital needs can be covered by external sources. As the country exposure of private external lenders will be limited due to transfer (country) risks, a permanent flow of capital out of domestic savings will be necessary.

Central governments or major public companies are the only institutions to borrow directly in the securities markets, due to their standing. Projects of local governments are quite often too small for stock-exchange issues, whereas the balance sheets of recently privatized companies will not be strong enough to attract long-term capital. But also banking institutions as financial intermediaries have to raise the funds in the market prior to channelling them through in the shape of loans.

Establishing a long-term capital market has to meet specific challenges. The stabilization programs of IMF, World Bank and central banks are normally under condition of strict domestic credit ceilings and tight minimum reserves to secure monetary stability. The resulting conflict with the target of long-term capital supply can be settled by establishing a separate market for investment capital in which debt service is matched by the returns on the related investments. Due to this "matching", the volatilities could be evened. In countries with significant inflation rates index clauses for funding and lending would have to be matched in order to avoid excess of money demand or supply. By these means monetary institutions could achieve independence and would be enabled to limit their measures and credit ceilings to the short-term money markets. As a result, a similar situation would be achieved as the one of national monetary institutions within the EC prior to the last stage of the Monetary Union where monetary policy still remains within national responsibility.

From the point of view of banking supervision, stability in the sense of strength and soundness of financial institutions is required, which implies solid lending practices. As regards the maintenance of a capital basis which is sufficient to cover the ordinary banking risks, the examples of the Czech Republic, Hungary and Poland show that regulation in line with the principles of the Basle Committee on Banking Supervision and related EC Directives[3] is possible along with transitory supplements. In order to avoid

3 Solvency Directive EC OJ 1989, L 386/14 and Directive on the Own Funds EC OJ 1989, L 124/16. Regarding investment firms see EC OJ 1993, L 141/1 and L 141/27.

risk concentration, the EC Directive regulating large exposures[4] may serve as an example. The correlation of debt service and return on investments will have to find its counterpart in the asset-liability management of banks. Mismatches caused by differing indexation of funds and loans would be particularly dangerous. In this field, EC legislation so far is insufficient, because related regulation only exists for investment firms and not for banks.[5] Therefore, this subject will be taken up by the Basle Committee on Banking Regulation step by step. Long-term lending merely against balance sheets of debtors is not advisable. A "golden banking rule" requires fixed assets to be financed on a long-term basis and not by short-term deposits.

4. Major Problem: Incentives for Long-term Savings

A basic requirement is supporting incentives for long-term saving. Looking at the experiences in East Germany, considerable private savings were held in the form of deposits or cash. Initially, they went into consumer durables such as cars, TVs and fridges, of which the private individuals had been under-equipped. In the reform countries we have to face a similar situation. Meanwhile, savings rates are increasing, however highly focussed on short-term deposits. Investors would only be prepared to undertake long-term opportunities if they can trust in the safety of their capital. The security has to be two-fold:

1. value ptotection, i.e. protection against inflation and securing real interest rates;
2. depositors protection against failures of banks.

Basically, both problems remained unsolved. In reform countries benefitting from reasonable monetary stability—mainly the Czech Republic and Hungary, variable interest rates may offer a certain security of real interest rates and hence value protection. In countries with a less stable situation, depositors facing negative real interest rates will find themselves in a losing game. In Poland, e.g., the interbank rate was 37%, when an inflation rate of 45% had to be faced. From the point of view of depositors'protection, the capital ratios of banks are widely weakened by write-offs against pre-reform loans or just in the stage of building up in case of new establishments. This is not a situation in which long-term deposits appear to be advantageous. Even in the EC, there are still disputes on the principles of depositors' protection.[6]

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4 Final draft see EC Dok. 5766/92.

5 Measurement of Banks' Exposure to Interest Rate Risk, Basle April 1993. Regarding investment firms and securities portfolios of banks see EC Directives OJ 1993, L 141/1 and L 141/27 as well as the related Basle Committee on Banking Supervision proposal "The Supervisory Treatment of Market Risks", Basle April 1993.

6 Recommendation EC OJ 1987, L 33/16; draft EC Directive OJ 1992, C 163.

5. *Possible Solutions*

With a view to these unsolved problems, savings are concentrated in deposits with savings banks. The outcome of the first experiences in raising long-term funds was not uniform; in Hungary, the first industrial bonds were sold successfully, whereas in the fairly reasonable monetary environment of the Czech Republic five years bank bonds issued under attractive conditions are taken up reluctantly. The obstacles in the Czech Republic seem to result from investors' attitude which is not in favour of long-term engagements, whereas in Poland reasonable indexation might help.

How to clear all the hurdles? An institutional approach of supporting long-term saving would lie in provision of old-age life insurances and pension funds. This approach would introduce a potential of long-term investors in securities or property. At the early stages, strict regulatory frameworks are advisable in order to inspire investors' confidence. The EC Directives on life insurances may serve as an example of minimum standards.[7] This approach has proved to be a highly stabilizing factor in Chile. Within 10 years, considerable amounts went into pension funds within a social security program. Institutional investors also had a stabilizing influence on the German post-war capital markets. Regarding the reform countries, life insurances and pension funds are being established e.g. in the Czech Republic.

Another instituional approach would be investment funds following the French example. Here, again, the related EC Directives[8] may serve as an example of minimum standards.

Also the Danish or German mortgage bond systems should be taken into consideration, securing both depositors' protection and long-term investment:

1. bond issue by specifically licenced banking institutions only;
2. specific public supervision over issuers;
3. regulation protecting investors;
4. coverage of bonds by legally specified assets until the date of termination;
5. preference of the mortgage bond creditor in the event of bancruptcy of the bank;
6. standardized funding and investment instrument the rating of which can be kept widely independent from the specific issuer, taking into consideration collateral rather than credit-worthiness;
7. swapping savings into financing long-term fixed asset investments including infrastructure and public debt finance. The German mortgage banks e.g. cover more than 1/4 of the public credit demand, whereas 40% are raised by immediate governmental bond issue.

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7 See particularly EC Directive OJ 1990, L 330/44.

8 EC OJ 1985, L 375/3; L 212/37; 1979, L 66/21; 1980, L 100/1; 1982, L 48/26; 1988, L 348/62; 1989, L 124/8.

This standardization is achieved through mortgage bonds which may be issued only by banking institutions which are subject to specific supervision and a limited range of activities which investors can clearly keep track of.[9]

On the other hand, the system of mortgage-backed securities, the principle of which could be simplifyingly circumscribed as independent mortgage portfolios, shows certain disadvantages:

1. it is hard to standardize;
2. without governmental guarantees, a highly complex structure of guarantees and collateral is necessary which is hard to survey from an investor's point of view.

In particular, the Danish and the German systems of mortgage bonds can serve as good examples of how large sources of funds can be raised, at stable conditions, stabilizing the monetary environment as well as the property market and hence minimizing volatilities. The economies of the reform countries may not yet be prepared to introducing fixed interest rates. But the "Pfandbrief" system has proved its efficiency in environments of various indexations and variable interest rates as well. During the currency difficulties following World War I, the German mortgage banks were able to attract significant amounts of foreign capital by means of mortgage bonds on a gold or US$ index basis—a success due to the cumulation of security.

After all, the mortgage bond system shows a good track record in the tradition of many reform countries—Baltic states, Czech Republic, Hungary, Slovak Republic. Characteristically, it has developed in an environment of capital undersupply for agricultural (18th century) and residential (19th century) purposes.

6. Banking Structures: Universal Banking System, Supplemented by Specialized Institutions?

The main condition of a successful introduction of mortgage bond funding would be strict regulation regarding loan-to-value ratios, principles of valuation and supervision over issuing institutions as well as workable stock exchanges. The adoption of well-proven EC standards would facilitate attracting foreign capital. As an institutional supplement to raise long-term funding one might also think of "Bausparkassen". As the related system requires disbursements to be linked to specific collective funds, medium-term bridging finance and additional long-term loans would be necessary which could be supplied by mortgage banks. With regard to introducing "Bausparkassen", the Czech Republic, again, may serve as a model.

The divisional structure of the banking system existing in many reform countries is a major obstacle to establishing long-term capital markets. These divisional structures had been used for channelling specific subsidies. As a result, individual savings banks were able to build up monopolistic positions in the field of private deposits. The Polish PKO,

9 As for the EC standard for "Pfandbriefe" see the so-called OGAW Directive Art. 22 (4).

e.g., holds 40% of all private deposits. Accordingly, 80% of the Hungarian residential mortgages are concentrated in the OTP Bank. Insufficient alternatives for investors, coupled with shortage of credit supply are the reasons for windfall profits with high real interest margins for credit institutions and negative real interest rates for investors.

On the contrary, a universal banking system is capable of supplying a broad range of competitive credit and investment instruments. It would also avoid concentrations of risks linked to specific economic sectors and facilitate balancing cross-sector profits and losses, which is necessary to improve the average capital ratios. However, as a booster for long-term savings the universal banking system might be supplemented by a group of institutions with a limited range of activities, subject to specific supervision and specialization:

1. The necessary improvement of capital ratios of universal banks to 8–12% will take time. The IMF states with a view to the Czech Republic:

> "...welcoming progress in establishing a modern banking system. Directors nevertheless observed that the weak balance sheets of commercial banks remained an obstacle to efficient intermediation. Therefore, in economies with developing capital markets it seems reasonable to establish institutions with a limited range of activities which can be clearly overviewed by investors, subject to specific security and control. This approach should facilitate attracting long-term savings. The traditional European mortgage banking system comprising residential and commercial mortgages as well as loans to public entities has proved to be a highly secure field of activities. However, these positive experiences depending on a spread of risk between mortgage collateral and public debt show that specialization should not be over-extended towards a focus on sectors with a specific need for aid and subsidies. Governmental guarantees for former public institutions would undermine competition and cannot have any anchor in market-oriented economies".

2. These institutions could be kept free from problem loans dating back to the central planning era.

3. As they do not have the cost problems of universal banks resulting from retail and clearing business, loans at advantageous conditions could be supplied for housing, infrastructure and agriculture.

However, in the beginning relatively strict regulation is recommended.

With regard to re-structuring the banking systems in specific reform countries, the most far-reaching progress has been achieved in the Czech Republic. Along with privatization, i.e. conversion into public companies, the universal banking system was established. Facing serious difficulties in funding long-term investment loans, one might now think of introducing mortgage banks. A law on Bausparkassen already exists. In Poland and Hungary, the future development of banking systems is still an open question.

7. Developing Property Markets and Property Finance

Investments in property are an important part of developed economies; property finance is a motor of investment finance.

In the field of commercial properties, the situation of the reform countries can be well compared with the development in East Germany. A speedy pick up of construction activities is likely as soon as considerable returns on investment are to be expected. This is particularly true for investments related to day-to-day needs of private individuals such as supermarkets, but also for the shortage of office space. These investments will also attract foreign capital.

Private investments in rented houses depend on whether the rental prices are still regulated for social reasons. Only open market rentals are sufficient to cover refurbishment or construction costs. This is a serious problem, because the population is not familiar with rental prices at a cost basis. Basically, housing in reform countries shows a differentiated pattern.[10] In the Czech Republic and Poland there is a large housing stock owned by the public or by the co-operative sector. The related post-war stock was normally constructed with pre-fabricated parts, now often suffering from serious need for refurbishment. In the Czech Republic privatisation has made such a speedy progress that following an interim peak, housing and rental prices are on a certain decline. Poland, on the contrary, is still at the dawn of the development. There, the demand for new construction is estimated at 350 000–400 000 units p.a. during the next 15 years. In Hungary, private residential property is rather common; here, mainly smaller amounts for refurbishment facilities will be required. Initially, one might recommend the introduction of open market rental prices to the upper segments of new construction, as in the case of East Germany and the Czech Republic, at the same time vacating social housing in favour of the less prosperous part of the population. For systemic reasons of market-orientation, income subsidies should be preferred to interest payment aid.

Fundamental requirement of a market-oriented property sector is the clear establishment of property rights and a framework of laws that enable the exchange of these rights and enforce contracts in brief, clearly defined rules of the game. Basically, the necessary political intention is present in reform countries. The difficulties in property markets and property finance are normally focussed on specific fields:

1. Although the notary system was broadly implemented, clarity and security of property rights as well as speed of transactions suffer from various obstacles. The unconditional introduction of the principle of the constitutive effect and public faith of the entry into the land register would already mean significant progress. Along with a range of preliminary titles—which cannot yet be found even in advanced legal systems such as the one of the Czech Republic—these principles would already form a solid basis for straightforward transactions. Claims for restitution by former owners—a problem which is very common in East Germany—have to be settled speedily.

2. Following the experiences in East Germany, clear titles are also a fundamental condition for the establishment of capital markets on a mortgage bond basis, because

10 See RENAUD, Betrand: Housing Reforms in Socialist Economies, World Bank Discussion Papers no. 125, Washington D. C. 1991.

related risks would concern the safety and soundness of bonds. This problem is particularly serious as long as issuing institutions in reform countries have not yet built up sufficient reserves.

3. A further necessary condition for the establishment of property finance would be the enforcement to execute mortgages. For social reasons, there still exist many obstacles in this field. In Poland, e.g. residential properties cannot be vacated unless the occupier is offered an alternative accommodation. A possible step-by-step approach might be limiting the speed of vacation to the upper segments of the market, i.e. the more prosperous part of the population in the beginning.

4. With a view to the monetary environment, indexation of debt service and funding instruments will often be unavoidable. Therefore, mortgages should be open for indexation, currency clauses etc.

5. Open market financing of accommodation requires basically a market-oriented rental system which might be introduced step by step following the example of East Germany. Here, the basic rental price is regulated and subject to annual reassessment, whereas renting newly built accommodation is liberalized. As a consequence, refurbishment of the old stock has to be undertaken step by step following the liquidity out of the permitted rent increase. This liquidity would be also the limit of possible debt service.The Czech Republic may serve as an example that situations exist when residential rentals can decline.

6. Planning law and planning consents must be clear. The major problem, however, is matching planning consents with actual needs. It will take time until planning authorities will have an overview of demand and supply. As a result, property markets will be volatile, affecting the value of collateral and hence the soundness of banks and bonds issued by mortgage institutions.

7. Mortgage bonds are necessarily linked to property valuation, because the property is the underlying value determining the safety and security of bonds. With a view to the volatility of developing markets, strict regulation regarding the loan-to-value ratios of mortgages is necessary in case they have to serve as bond collateral. This is also true for professional valuations themselves.

8. A serious obstacle to progress in the structure of housing finance and to financing urgent refurbishments is the indebtedness of public residential property companies and co-operatives resulting from the socialist era. This problem arose in East Germany and still exists in Poland. The related debt service does not leave any room for financing refurbishments, and the existing loan amounts block the properties to be mortgaged. Hence, these companies are not credit-worthy from the point of view of private lenders. The East German example demonstrates that the only possible solution which would not jeopardize the stability of the former lending institutions (normally public banks) is taking over the existing debt by the central government and then cutting it down. Due to this operation, the East German residential property companies were made credit-worthy and the related refurbishments can be financed by private lenders. It was also necessary to convey to these companies the public housing stock which can now serve as a source of collateral and liquidity for borrowing. The costs of the German operation amounted to

approximately DM 38 bn. In Poland, the amount of debt might be 60,000 bn Zloty which would of course increase central government indebtedness. In order to avoid further weakening the central government's standing, one might think of finance by sources of international stabilization programs in order to pave the way for future private lending.

8. Outlook

Procuring capital for the developing markets of the reform countries is a great challenge. It will be crucial to separate the investment capital market from the short-term money market. With the establishment of a long-term capital market where the payments for financing are adapted to the returns on investment, the monetary institutions could achieve independence to limit credit ceilings to the short-term money market.

Long-term funding requires the confidence of investors. For this purpose, a universal banking system seems appropriate, which is supplemented by institutions securing collateral for funding instruments, subject to specific supervision and strict regulation. If this regulatory environment can meet European standards, the attraction of foreign capital should also be possible. Implementing common standards is possible without formally joining the EC or the Monetary Union. The field of capital standards for banks[11] is an example of how the principle of minimum harmonization of standards can support tendencies towards homecountry control and domestic preferential rather than most-favoured treatment in cross-border financial relations. The US Banking Agencies state:

> "in determining whether a bank's capital meets the minimum standard, as an initial requirement applicants that adhere to the Basle Accord will be required to meet the Basle guidelines as administered by their home country supervision. ... the Basle standard provides a common basis for evaluating the general equivalency of capital among banks from various countries".[12]

Another example of harmonizing regulation of the economy without being over-engaged in political unions is the European Economic Zone (EEZ).

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11 BIS, International Convergence of Capital Measurement and Capital Standards, Basle 1988.

12 Federal Reserve System, Board of Governors/Secretary of the Department of the Treasury, Capital Equivalence Report, 19 June 1992, p. 42.

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Thomas TRUMPY

Implementing Appropriate Technology: The North-South, East-West Challenge

There is a direction in history, progress exists. The 'direction of history' is not an 'ism', not socialism, not capitalism, not totalitarianism. It is economic progress fostered by the successful development, diffusion and utilisation of the fruits of man's mind, technology and technological innovation, from the wheel to the telephone, to today's fax and modern culture, to tomorrow's perhaps paperless, meetingless society.

Introduction: Innovation and Technology

1. Innovation and technology, in all their forms, are the key to economic development

Only implementation of new technologies has and will contribute to meet our economic, social and environmental goals, and to keep our economies growing, and INNOVATING!

— Economic growth leads to innovation and provides the means for its implementation.

— Innovation provides the means for economic growth and leads to economic growth. To meet our global challenges: economic development, the population explosion, energy penury and environmental damage, we have only one choice: *We must innovate and innovate, we must introduce and promote the most economic and beneficial technologies.*

2. Technology is a catalyst resource for worldwide economic growth

As part of the 'Uruguay Round' of the GATT negotiations the nations of the world are making commitments to protect intellectual property and to liberalize trade in services, and thus to encourage improved and accelerated diffusion of technology.

To catalyse change, economies need introduction and application of improved technology. Technology is the tool for economic development. Technology moves worldwide in many forms: intellectual property rights, products, techniques, services, training.

Most economic development and improvement projects, and energy projects in particular, need the *catalyst resources: Investment, Management and Technology.* (See: 'Resource Sharing: Penury or Development', T. Trumpy, 54 Hague AAA Yearbook 184, 1984.)

3. Technology is an organic, renewable resource for change and development

New technology is the result of inspiration, perspiration and market demand.

— We can engineer technology to meet known needs, or create new markets for new ideas. We need both approaches. Neither alone will give the best path to development.

— Technology grows to meet needs; it continues to advance and to evolve. But like plants in a garden—those we want and need do not always thrive and grow the fastest!

— Some needs are not large economic markets (tropical diseases, waste disposal).

— Some unnecessary innovations are enormous markets (fast food franchises, snacks).

As public policy seeks to provide the 'best available economic technology' for the needs of the economy, it must also anticipate TOMORROW's technical advances.

— We must study and respect development, testing an investment time cycles from laboratory to implementation. We must encourage innovation and technology diffusion.

4. Technology is a special type of property; it needs special protection

Project planners often neglect the particularities of protection, transfer, guarantee and remuneration of technology, assuming that if the physical aspects of a project can be financed, the promoters can obtain (cheaply and rapidly) the intellectual property rights necessary to complete the project and to produce the products.

— Particularly in economies in transition and development this is rarely possible! Industry will NOT offer technology in countries where it cannot be protected and controlled, in countries where a licensor cannot STOP dangerous practices or products.

— Particularly if an operation or project can only be partially controlled, licensors bear enormous risks for product liability (Remington) or environmental damage (Bhopal).

5. Technology is the fruit of physical and intellectual labor. It must be paid for!

Technology is property. *Technology transfer is investment.*

When there is no economic stability, there will be no investment.

Needed technology will not be made available nor applied.

Applying new technology requires SOME taking of SOME calculated risks. However:

— No incentive will make an owner of technology risk selling unproven technology.

(Lessons from windmills, coal gasification and PFBC, and from pharmaceuticals.)

Owners of technology demand legal and financial security in recipient countries, or transfer of technology and economic development will be delayed.

— *New technology is rarely offered to economies in rapid transition and restructuring.*

6. Public policy must help to bring technology to market, to make it available

If public goals call for new technology, public policy must help bring it to market.

But public policy generally requires expenditure of public money; public funds are not an inexhaustible resource, so, public policy must favor and aid those technologies which will offer high economic and environmental returns for the whole economy!

Policy push and market pull can make technology available more rapidly; but much technology is not yet proven in practice, or has not yet been engineered to meet the challenges of specific present and future needs, or of smaller markets. More is needed.

7. Implementation of new technologies requires proven reliability

Technology must be proven, and must be appropriate in scale and application.

— The greatest FEARS of both owner-licensor and of user-licensee are of unexpected side-effects and of downtime (which seems to occur at times of greatest need!)

— The greatest REASSURANCE (in any part of the world) is:

— Ready and rapid availability of technical support when needed.

Who will pay to make efficient technologies available and economic in Western Europe, here in Eastern Europe and in the countries of the developing world?

— Public policy and funding, or guarantees for licensors, are needed to make 'best available' (cleanest and most efficient) *technologies reliable, safe and economic,* and also to make emerging *markets for such technologies reliable, safe and economic.*

Full-scale demonstration of new technology, and application of new technology to specific practical problems, applications engineering, require major investments of time and money. *Hungary is rich in geothermal power—who will develop it?*

Only support for full scale demonstration will bring NEW technology to market!

— The process must be guaranteed, the applications engineering must be paid for.

A review of practical and economic aspects and problems of selecting (introducing)

implementing 'new' technology shows that to obtain positive economic and environmental results we need *integrated systems approaches and favorable policy.*

— Policy signals and programs must 'bring technology to market' when and where needed.

8. Diffusion of improved technology is slowed by regulatory barriers to progress

Technology driven investments only occur if economic ('cheaper'). BUT

— If customs duties, taxes and product standards protect older products and older technology, implementation of 'economic' new products and technologies will be delayed. (The requirement of autocatalysers delays energy saving 'clean-burn' engines.)

Innovation and new technology need legal protection, NOT regulatory barriers. Evolving technologies and open markets should be encouraged; norms and standards should prescribe effects and quality, not the technical means of achieving a desired result.

9. Diffusion of improved technology is slowed by economic barriers to progress

Technology driven investments only occur if economic ('cheaper'). BUT

— If taxes, financial and fiscal incentives and product standards protect and encourage a certain product, licensors and producers increase its cost, reducing its economics, and delay further investment on better technologies. ('Mandatory' autocatalysers have high costs and high profits, and require incentives even for new vehicles.)

Innovation and new technology need legal protection, NOT economic barriers. Evolving technologies and open markets should be encouraged; norms, taxes and incentives should prescribe effects and quality, not the technical means of achieving a desired result. Appropriate technical solutions are neither 'cheap' nor 'expensive', but ECONOMIC. We must beware of uneconomic solutions; even if they have lower front-end costs and are 'cheaper' investments. A Lada or a Dacia car was 'cheap' to buy, but was uneconomic: more expensive, steel using, fuel consuming and polluting over 10 years (250,000 km). Large cheap power plants without CHP only have an uneconomic 42% efficiency, not 85%.

We must select and promote technology for its total life-cycle cost and benefit.

10. The 'market' does not always favor new technologies or economic technologies

Stable economic demand and open markets are needed to guarantee return on investment in technology. Economic instability and transition, and well-intentioned rule-making and rule-changing, incentives and taxation destabilize innovation, supply and demand!

— Governments should hesitate before meddling in markets, even for the 'environment'! Financial and fiscal policy should not create barriers to innovation and new products.

Competing technologies and their fruits are sold in fierce competition, regardless of the economically and environmentally most desirable technology or path of development.

In economic growth productive (expansion/improvement) investments come first! Investments to make cleaner, safer products, or to make products more cleanly and safely are a lower economic priority. We must select, motivate and aid sectors where NEW technologies can give the best returns for public as well as private goals!

If we let the whirling winds of a free market' blow freely, we may hustle and finance the evolving economies into hasty, wasteful and unwise investment in inappropriate technologies and products. Then will come the economic and debt crisis of 1998!

11. Diffusion of improved technology is slowed by political barriers to progress

Technology competes in a world market. The products made with technology compete in a world market. But the savings and the profits of the use of the best available technology are not obvious. Governments protect markets and tax our bad habits: energy alcohol and tobacco. They hesitate to encourage change; it may reduce tax revenues! Likewise, higher, 'more protective' customs duties provide some additional revenue for the State, but provide only a temporary barrier protecting production of lower quality, higher-priced goods against the inexorable tide of technology—more efficiently made goods at lower cost. American bicycles are cheaper and better than Indian bicycles!

Energy and the Environment

12. Energy savings and the environment: an example of conflicting political desires

Among the challenges of our world today are protection of the environment and reduction of wasteful use of our limited natural resources, such as energy. This need is not limited to the wealthy nations. We must now find means to implement this policy in Eastern and Central Europe, and we must think also of the developing countries.

Within the OECD economies there is consensus that for energy supply and environmental reasons we must adopt policies and find strategies and means to achieve both:

— Energy efficiency, reduced energy use, Rational Use of Energy (RUE), and

— Control, even reversal, of environmental damage and pollution.

However, Governments and energy sector companies profit from energy use and waste. Many States depend on energy revenues: profits of (semi-) public energy industries (oil, gas, electricity, motor fuels), (quantity related) excise taxes, Value-Added' taxes, taxes on profits of energy production, transport and distribution companies, fees to the State from energy imports (port and import fees and franchises).

— *Who wants energy savings?*

* Market pricing for national competitiveness drowns encouragement of energy savings.

— *Many States fear the economic consequences of higher energy taxes and prices.*

— Belgium prices energy relatively freely (subject to fiscal distortions). Belgium already taxes energy by more than the proposed rate of the EC's Energy/Carbon tax (but

all this tax revenue goes into the general budget, not for energy efficiency demonstration or incentives!). Yet Belgian energy prices are still too low to encourage real, non-subsidized energy rationalisation investments, to make them ECONOMIC!

* The private sector will invest in energy efficiency only if energy is relatively expensive and energy saving technology and money relatively available and cheap.

— *Government must price energy so industry can accomplish public goals at a profit!*

* The cost of energy is a small part of the budget of most persons and companies.

— *Most investments to save energy (or use it efficiently) have a very poor payback.*

— For industry they are an economically irresponsible use of financial resources.

* Energy waste in the West is not that bad; presently best available technologies give only modest gains; the return on investment (the difference between cost of energy wasted vs. investment cost to save energy) is uncertain. Many countries have few or no financial or fiscal incentives to reduce payback time. *Who will pay for energy savings?*

If there is no economic reason for energy users to save energy, there is no economic reason to develop new energy efficient technologies. *Will energy efficiency die?*

We must MOTIVATE energy markets to change to energy and environmental conservation.

— *Energy is too cheap and money too dear-more energy saving is a poor investment.*

We must make economic a policy and strategy for energy retrofit with new technology.

13. Can government policy, rules and tax measures help save energy and the environment?

Normative and fiscal approaches (push and pull) may not always motivate change:

— if better technology is not yet adequately known and full-scale proven
[Pressurized Fluidized Bed (PFB), Integrated Combined Cycle Gasification (ICCG)]

— if front-end capital for implementation is unavailable (LDC'S and eastern Europe)

— when costs of regulation and taxes can be passed 'through' by utilities to users, (US use of 'lower sulfur' coal compared to FGD, FGD compared to ICCG)

— when imposition of one technical solution blocks further research or improvement. (Authorized 'compliance': FGD on power plants or catalysers on automobiles.)

Any additional 'energy tax' would have little effect on the public (as a % of total energy prices). Increased energy taxes would have more negative effect on Belgium's economy and already poor competivity than positive effect to reduce energy use/waste.

Eastern Europe

14. An example: Energy and environmental renewal in Eastern Europe

Using the example of improved energy efficiency and environmental protection, in particularly the application of commercially available New Technologies in

Eastern Europe, we suggest that intensified international cooperation is needed to establish:

— Common standards for equipment and process evaluation,

— Norms for environmental and energy efficiency Impact Statements, and

— Guidelines for approval of investments, subsidies and lending to projects.

The collapse of the 'centrally planned economies' of Europe was provoked by under investment in new technology. The Soviet dominated economies were forced to cover the non-productiveness, the unreliability and the non-competitiveness of their industrial and product technologies by induced scarcity (automobiles), low prices and producer subsidies, the only, unreal economic world in which they were marketable!

It is easy to identify opportunities for new products and projects in Eastern Europe, but a serious task to determine the most economic solutions and how to structure them.

— Turbulent market conditions and uncertain medium-term financial stability of the local investment-receiving enterprise may block a project, even if the initial equipment cost and investment risks can be guaranteed by public institutions.

— Continuing risks of licensors can be enormous and unmanageable (e.g. risk of loss of control of a technology in case of insolvency or take-over of a licensee).

Yet many more projects in Eastern Europe are economic than some public-sector planners and economists believe. Some energy projects have immediate (under one year) payback.

If technology needs first to be engineered to local needs and then demonstrated, SMALL demonstration projects are preferable. Improvement is more visible, although cost is relatively high (e.g. renewal of district heating pipe insulation, Kaunus, Lithuania).

We must now train Eastern Europeans (and 'Western' bankers and businessmen!) how:

— to identify such projects and bring them to the attention of the private sector,

— to package such projects for financial attractiveness and lowest cost,

— if needed, to attract foreign equity, loans, technology, suppliers and customers,

— to negotiate projects in the best interest of all parties and Eastern Europe,

— to avoid *unnecessary foreign* participation, costs, imports and involvement.

15. Eastern Europe: Building a bridge between technology needs and skills available

The emerging economies of Eastern Europe in particular need technology-led economic renewal, as they are already mature industrial economies with adequate (but not splendid) infrastructure for commerce. Principal goals of this renewal must be:

— renewal of most energy producing, transforming and using equipment on a more environmentally compatible, economic and efficient basis;

— renewal of the means of production, and restructuring/reselection of sectors;

— modernization and improvement of quality of most products and services.

'Development' or 'Renewal' energy projects, whether for supply, transformation or demand side, whether to improve energy efficiency or decrease pollution or both, will need finance and management. Usually they also need introduction and application of improved technology in the form of: equipment/engineering/ knowhow/training.

16. Matching skills and needs—Do not reinvent the wheel—Open the markets!

We must review public and private skills needed (and available) in Eastern Europe.

Eastern European industry had excellent, under-utilized engineers. Often they have been prevented from adopting the latest techniques not by ignorance or pride, but by:

— Western (COCOM) restrictions on the transfer of some technologies and equipment;

— unvailable capital or foreign currency to buy modern technologies and equipment;

— (e.g. mine mouth coal preparation plants for run-of-mine coal in Poland)

Local engineers frequently know the needs they could not afford to fulfil. Ask them!

We must identify the West's transferable/exportable technologies and market them.

— Identification of such technologies, analysis who can transfer them, analysis of priority markets in terms of payback on new technologies, and development of legal and economic conditions to encourage owners of techniques to cooperate to market them abroad, ALL must become Western policy goals for cooperative industry projects.

— *Eastern Europe must ask for what it needs, and must open its markets to the West!*

We must also identify what products, services and skill Eastern Europe has to offer.

— *The West MUST open its markets to those products and services of emerging economies!*

17. The project recipient—Eastern Europe—as project partner

Where technical input is needed, review when a project needs:

— to attract local and foreign equity, loans, equipment and supplies;

— to avoid unneeded foreign participation, purchases and involvement.

The EC's PHARE Program is praised compared to national OECD export-credits, as local-source material can be substituted, thus reducing import costs and foreign capital.

Eastern European engineers have adapted with amazing speed and are NOW the best project engineers and local partners. Unlike 'Institutes' they can IMPLEMENT new technologies.

— Call on these local skills, to match local needs to available technology.

— Use local engineers to find local parners and to manage sub-contractors.

In many cases the time is now ripe for the West to support (much less costly) intra-East European cooperation and aid, and to encourage partnerships within Eastern Europe.

— *Technology transfer is the transfer and continuing upgrading of LOCAL skills.*

— *Technology transfer is a CONTINUING partnership—not a cure one can inject!*

18. The role of the Western partner/investor/licensor

Investment and technology transfer require political and economic stability. We need a *new relation of trust and cooperation between the OECD countries and Eastern Europe.*

— We must help Eastern Europe (and the LDC's) to learn what they NEED from the West.

Western help should be hands-on big-brothering to help Eastern Europe help itself. *Publicly supported, private sector teams* (e.g. the EC's OPETS) develop local skills.

The West has many needed skills and technologies. Unfortunately much time and effort is wasted by eager but technically illiterate bankers and bureaucrats solicited by hard-sell Western consultants and high-price fly-in-fly-out experts with universal ideas.

19. Crossing the remaining project barriers in Eastern Europe

It remains difficult to structure projects to provide security of ownership and remuneration of intellectual property rights for an investor or licensor, particularly as the legal structure and economic viability of many enterprises is uncertain.

— Legal structures for securing rights to payment on industrial and commercial projects in most of Eastern Europe are new and unproven.

— Rights in insolvency are still a puzzle, and litigation appears uncertain rapidly to stop infringement or misuse of technology.

Technology is as proprietary as investment capital. Legal conditions must assure their protection. (See: Analysis of Financial Regulations and Incentives Governing Foreign Private Direct Investment, T. Trumpy, 47 Hague AAA Yearbook 114, 1977).

— If risks are too great relative to rewards—technology is NOT made available.

— If there is no secure expectation of profit—technology is NOT made available.

If energy retrofit and other types of economic renewal in Eastern Europe are to be a private initiative, licensors and investors need security for investments and a fair rate of profit. Energy renewal and many other projects can be privately implemented and financed, IF they are economic and if the technology has been demonstrated/proven.

All economic and financial aspects of proposed projects must be analyzed. For energy efficiency and environmental improvement investments (or expenditures) the goals are:

— to improve payback periods for both investors and investment recipients,
— to minimize investment and costs to public sector institutions and municipalities,
— to reduce high profit margins demanded by foreign currency investors, and
— to minimize national balance of payments costs and risks of foreign financing.

We must structure investments to reduce costs and foreign exchange risk. We must:

— maximize local purchases (when consistent with investors' export credits),
— maximize use of local financing, fiscal incentives and tax deductions, and
— compensate with export trade (including partial sub-contracting to order) or
— sequester currency streams on project related (or unrelated) exports, or
— sequester currency streams on project related (or unrelated) import-avoidance, and
— 'partner' with local firms to multiply skills and profits on future projects.

Where technological input is needed, consideration will also be given both to needs:

— to attract foreign equity, loan and supply participation, where appropriate, and
— to avoid *unnecessary* foreign participations, costs, imports and involvement.

We must select and motivate key sectors with MONEY and proven available technologies!

Conclusions

20. Public–private cooperation is needed for energy, the environment and the economy

Are energy and the environment too important to leave to the 'free market'? Are technology transfer and economic development too important to leave to the market?

– In the world of the blind the one-eyed are king. State must COOPERATE with industry!

We need varied policy approaches–and greater technical-economic dialogue NOW:

– Some technological efficiency gains are economic NOW (CHP, topping turbines).
– Some (with 'push-and-pull') can be made economic more or less rapidly (ICCG).
– As experience increases, risk decreases, cost decreases, economics improve.
– Some require public support, implementation and changes of lifestyle (CHP).
– Some violate rules of physics are dangerous (underground coal gasification).

We need increased dialogue among local, regional, national and international:

– energy and environmental policy makers, administrators and economists,
– providers of technology and applications engineering,
– providers of equity and debt finance, public and private, and
– businessmen: producers, buyers and sellers of goods and services.

Such dialogue must assure funding for demonstration projects and implementation, and:

– seek appropriate technologies in view of need, cost and viability/maintenance,
– 'appropriate technologies must be proven, available and economic (cheap),
– provide legal and operating structures, security and guarantees for all parties,
– analyze financial circumstances of proposed investments/expenditures so as to:
– improve payback periods for investors and investment recipients/partners,
– reduce overall costs for project reviews, engineering and implementation,
– reduce or eliminate foreign exchange risks and burdens to parties and countries.

And we must open Western markets NOW to the ECONOMIC products of Eastern Europe!

Thus we need international cooperation, North-South, East and West, to assure that:

– international borders open to technology and that countries assure its protection,
– the best available and the most appropriate technology be effectively available,
– appropriateness respect economic, social and environmental criteria,
– the products of improved technology can be freely traded in the world marketplace.

Economic development, improved energy efficiency, better environmental standards are linked. With cooperation ALL will come in the normal course of a social market economy.

21. The role of technology policy in a social market economy

Companies wishing an active role in Eastern Europe in energy renewal and other projects should identify and plan projects NOW, and proceed as soon as technical and financial

risks can be assessed and managed. They should work with local partners and government.

Companies compete, seeking profits from innovations which give savings and market advantage to purchasers. *If the state helps on the costs, it should share in profits!*

— We need private research, and protection and dissemination of innovation!

— We need cooperative demonstration projects to bring technologies to market!

— We need selective aids (investment incentives) to improve retrofit payback times.

To accelerate change and growth in emerging markets we need the help of the state to share some of the costs and risks. We all win if the private sector and government work together where needed, but when government does not interfere in the normal cycle of technology and industry, or in selecting or imposing technologies on industry.

— *If bureaucrats could pick tomorrow's winners— they would not remain bureaucrats!* Yes, we suggest that intensified international cooperation is needed to establish:

— Common standards for equipment and process evaluation,

— Norms for environmental and for energy efficiency Impact Statements', and

— Guidelines for approval of investments, of subsidies and for lending to projects, (but we favor subsidiarity at all levels, and respect for private initiative!)

— Economic growth, not taxes, permits investments for energy saving and less pollution. *CAPITALISM WORKS—Support and Help Free Enterprise.* Thank you.

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The International Protection of Human Rights after Vienna: the Future of the United Nations Supervisory System

1. Introduction: The "Close Call" of Vienna

Over the years, against many odds, the United Nations have succeeded in developing multi-faceted international institutions for the protection of Human rights.

In its standard-setting aspects, the system includes nearly one hundred treaties as well as some Declarations which various experts consider either as proof of International Customary Law or as accelerators of its emergence.

The system further includes several mechanisms for monitoring and deterrence: periodic public debates on violations, where NGOs participate; the critical examination of state reports; complaint procedures of various types, open to individuals and NGOs; as well as a growing number of ex officio investigations by Expert Committees or Special Rapporteurs.

True, this system normally does not lead to compulsory decisions, as they exist at the European and Inter-American levels. It is far from perfect. Nevertheless, its very existence is remarkable, considering the narrowness and ambiguity of its legal basis in Articles 1 (3), 2 (7), 55 and 56 of the Charter.

A pragmatic process, built upon a maximalist interpretation of the Charter, it lead to a near-metamorphosis of the Organization. Utilizing the "mobilization of shame" as their sole or main weapon, these procedures have had some sizeable degree of effectiveness.

In Vienna, at the UN World Conference on Human Rights of June 1993, this castle of cards was nearly swept aside.

To a large extent, the debate in Vienna was ostensibly conceptual. An important group of States, mostly from South and South-East Asia, lead in part by China, challenged the concepts of the universality and indivisibility of Human Rights. These had been, and remain, the very bases of the United Nations system. In short, universality was challenged as a disguise for Western cultural and political imperialism. The indivisibility of HR was rejected in favour of a hierarchical doctrine granting full priority to collective rights, especially the right to development conceived as a collective entitlement. Finally, however, the universality, indivisibility and equal importance of all Human Rights were re-affirmed, but after a hard, protracted fight.

The conceptual debate concealed another tension—possibly the crucial one—over the monitoring and deterrence powers of the United Nations. Various challenging States denied that the Organization had any power under the Charter to take any supervisory action without the explicit consent of the States concerned at every stage of the procedures. Cooperation, they said, should never presumed—as the UN had in fact sometimes done—from absolutely sovereign States. The aim almost appeared to be a return to a pre-1960 United Nations dominated by a resurgent Article 2 (7). Again, the challenge failed narrowly.

The compromise Vienna Declaration was built around two leitmotifs: "cooperation" and "objectivity". As usual, at the United Nations these are ambiguous concepts, already prominent in the Charter, but to be decoded in the Vienna context.

"Cooperation" was meant by the majority as a strong demand for increased efforts to reach a consensus based on genuine respect for all cultures and political regimes, without undue "selectivity". In itself a legitimate call, not always heeded in the past.

This emphasis on "cooperation" and "non-selectivity" was meant to apply to supervisory processes without, however—and this is essential—questioning existing UN powers to monitor and deter.

Such are essentially the lessons of the Vienna "close call". They are not likely to wreck the UN HR mechanisms of today. They might even improve them somewhat in promoting more objective standards in the choice of culprits.

But would the Vienna spirit assist or hinder the UN in adjusting to the needs of the 21st century?

The emerging world will be a multipolar one. More sophisticated and cheaper resources—intellectual, technological, military—will be spread among an increasing diversity of power centers: supranational politics, states, non-statal ethnic, religious or ideological groupings, as well as huge multinational corporations. A "dangerous place" therefore, fraught with growing trends towards violence and mass atrocities, developing faster and faster.

The United Nations Human Rights System is not at all adjusted to this future World. To avoid the "dustbins of History", it must imperatively reform. Let us briefly reflect on the broad lines of this reformation.

I. Towards Early Prevention

The United Nations cannot wait for fires to break out before doing anything about them. From merely desirable, preventive action will become an imperative need in the future. Progress in communication and military technology, as well as the increased availability of equipment and weapons will accelerate the emergence of conflicts and of ensuing mass violations of human rights.

The UN System at present—whether in the form of complaint procedures or of ex officio Special Rapporteur inquiries—shows an almost total post facto orientation.

How to achieve its mutation towards an early preventive mechanism?

A. Effective Data-gathering

A comprehensive UN report on the main practical problems and the main trends in human rights in the various regions and states of the world, quickly available and constantly updated, would be an essential strategy. It should include all available sources of information in the UN system: periodic and occasional state reports, findings of bodies responsible for handling complaints, various submissions by States, intergovernmental organizations and non-governmental organizations, and studies by subcommission and Commission Rapporteurs.

Human Rights data exist in abundance within the UN System. True, they are often not up to date. They are useful, however, to identify long-term and medium-term trends through time and country-to-country comparisons. Such analyses are nearly impossible at present, the data being so widely dispersed and hard to retrieve. Synthesizing them in an action-oriented manner requires extensive and intelligent computerization of the UN system. The need for computerization is indeed foreseen by the United Nations. It is all the more regrettable to note the small amount of contributions so far received by the UN Voluntary Fund for the Financing of the United Nations Database referred to in General Assembly resolution 45/85, pursuant to the recommendations made in 1990 by the Task Force on Computerization. The suggestion made at the fourth meeting of chairpersons of UN Treaty-bodies that private sources might be asked to contribute should be carefully considered, having regard to the need to preserve the image of impartiality of the System.

B. A Permanent United Nations Presence

Effective prevention would require, as its most important element, the continuous monitoring of situations closest to the ground, if possible in situ.

Here and there, one perceives an emerging awareness of the need for a UN presence on Human Rights, as well as a lesser resistance of sovereign States against it. Thus, the visits in situ of investigation bodies—such as the Committee on Forced Disappearances —and Special Rapporteurs on countries—Equatorial Guinea, Guatemala, Haiti, Iran, Salvador and other situations—or on thematic issues—Torture, Summary Executions, etc.—are

increasingly, almost routinely, accepted by Governments. The short duration of these visits (one or two weeks per year), as well as occasional problems—such as inadequate preparations and lack of familiarity with the socio-cultural conditions of the country at stake—often severely limit their investigative and preventive value. Nevertheless, such missions are useful as contributing factors in the creation of state practice and, perhaps, one day, of customary law, regarding fuller cooperation with the UN monitoring system.

In quite another form, the UN are present in several countries as a provider of technical assistance and "advisory services" on Human Rights. Under this programme, experts—e.g. on constitutional law, electoral processes, or criminal procedure—are sent to requesting countries, fellowships are granted and training courses for key personnel (judges, the police, the military) organized, with a view to strengthening democratic institutions and creating a human rights culture. Experts and Training Missions stay in general longer in the countries concerned (say, from a few months to a year) than Special Rapporteurs. All these services are extended only upon request from the States concerned.

For over twenty years, States were very shy in asking for help under this programme, for fear that requests be perceived as implicit confessions of Human Rights failure. The last decade, in contrast, revealed a surge of government interest and a rebirth of the programme. The impetus came from countries which, under preceding dictatorial regimes, had suffered massive violations of human rights and destruction of their infrastructures, such as Equatorial Guinea and Uganda. other States with slightly less traumatic pasts, for example Guatemala, Haiti and Romania, followed. At present, even some less disrupted countries appear to be applying.

The mandates of at least some Experts and training missions of the UN HR Technical Assistance Programme appear to be broad enough to include certain preventive activities: data-gathering, conciliation, confidence-building, even expressions of concern and remonstrance. To what extent they do act in this fashion is difficult to know in view of the usually confidential character of their detailed findings. Some of them—in Equatorial Guinea, Guatemala and Haiti, for example—certainly carried out their missions in an active spirit of prevention.

Lastly—a positive novelty—Human Rights "components" were included in some UN Peace-Keeping, Peace-Making and Political Observers' Missions established by the Security Council: Cambodia, Salvador, South Africa, among others.

The Human Rights aspects of these Missions are often—purposely—covert ones, under such labels as "electoral surveillance", or "civil training". The UN Cambodia operation (UNTAC) was more explicit in including full sectors devoted to the promotion of Human Rights and Human Rights Education. Let us stress that a resolution of the Economic and Social Council of July 1993 called for the continuation of the UN Human Rights Education activities in Cambodia, in accord with the Government, for some time even after the termination of UNTAC.

However valuable, these ad hoc arrangements should not be viewed as substitutes for a permanent or long-term UN presence on HR. Only through such a presence can one gain the feel for societal issues which is required to deal effectively with emerging human right tensions.

Such Human Rights Advisers, established with Governments' accord at the subregional or, better, national levels, could perform or coordinate a wide range of functions: gathering data on available HR issues; spreading knowledge of UN standards and procedures; promoting with UNESCO HR education and training; gaining the trust of Government officials and helping to prepare their UN periodic reports and requests for HR technical assistance; developing relations with, and gaining the trust of minorities and NGOs; promoting confidence-building measures at an early stage of inter-group tensions; offering mediation and conciliation services; and, if all fails, reporting to the appropriate UN organs through the Secretary General, with proposals for remedial action.

There exist some offices of the UN system at the sub-regional level which could, if they wish, deal to some extent with Human Rights, inter alia, those of: the World Bank (with its "Governance" and "labour law" projects); the UNDP (with its "Human Development" programme component); UNESCO; ILO; UNHCR; and WHO. However, the prevailing attitude at such Offices has been sometimes described as an avoidance of Human Rights, viewed as political trouble-makers wrecking technical programmes. Furthermore, there is still little actual coordination, on Human Rights as on other matters, between these Offices. The proposed UN HR Advisors should work in close liaison with, and promote co-ordination between, all sub-regional programmes of this kind.

The mission of the suggested UN HR Advisers would thus be extremely complex and sensitive, demanding a high level of ethical dedication as well as objectivity and great diplomatic skill. From my experience, however, I believe that teams displaying such qualities could be found in the UN spheres as well as among governments and NGOs.

Would States ever accept such peoples for long periods on their own territories, or is the whole scheme a raving utopia? My answer would have been resoundly "utopia" only a few years ago, but today I am somewhat less sceptical. As noted earlier, governments do accept UNHR observers ever more readily.

In fact, the problem might in the near future have a different focus. The very readiness of states to welcome UN observers sometimes—or often?—conceals a strategy to use the international presence as an alibi. UN observers may be hosted as a convenient protecting screen under which Human Rights violations are perpetrated by "private" death squads. In this respect, the recent cases of Guatemala and Haiti should be borne in mind. The UN Commission on Human Rights rightly re-transferred those countries from the "assisted" to the "accused" lits. HR cooperation should always be coupled with critical vigilance.

In spite of strong pressures in its midst against UN power, the Vienna Conference did perceive to some extent the need for international preventive action. Thus, it called "strategies to address the root causes ... of movements of refugees" (A/Conf. 57/23 p. 9). It further recommended that the UN provide at the request of governments, as Technical Assistance, "qualified experts on minorities and human rights, as well as on the prevention and resolution of disputes, to assist in existing or potential situations involving minorities" (A/Conf. 157/23, para 25, p. 17).

II. Better Targeting

UN procedures increasingly highlight the important and sometimes decisive role of non-State entities in the perpetration of violations of human rights: ethno-nationalist movements committing genocide; religious fundamentalist groups guilty of summary executions and persecuting other religions; as well as transnational corporations which may be responsible for serious environmental damage and the maintenance of unfair working conditions.

At the opposite end of the spectrum, the operations of supranational entities such as the European Union may also create human rights problems for the citizen. They were the subject of an initial symposium, organized by the European Parliament and the EEC Commission, in November 1989 in which I was an interested participant.

United Nations procedures for the protection of human rights, dominated by a traditional view of international law centred on the State, generally ignore non-State entities. Consequently, deterrence is trapped in a vicious circle. The State, to which the United Nations addresses its exhortations, pleads its helplessness, which is disregarded in ensuing condemnations. True, the State should not be absolved without exhaustive scrutiny. It would however be just as unrealistic and dangerous to deny a transfer of responsibilities, in some cases, from Governments to parties outside their control. Sometimes—as in Bosnia, Lebanon and Somalia—the State appears to be nothing but an empty shell.

Thus operating in a vacuum of authority, non-state forces will grow more powerful and, quite possibly, more destructive of human rights.

The main response of the United Nations to this problem has so far been to step up technical assistance to weak States in order to strengthen their infrastructure against internal forces hostile to human rights. Such a response is necessary and important, but it is not enough. Until such time as the assisted State gives clear evidence of its increased strength, direct international deterrence against the perpetrators of atrocities that set themselves up as independent powers should also be applied.

There are already a few exceptions to the statocentric rule in international Human Rights Law. The Geneva Conventions and their Protocols have taken an important first step forward by affirming to some extent the international responsibility of all the parties to armed conflicts, including organized groups of insurgents.

In the same spirit, a number of recent United Nations resolutions (e.g. on Afghanistan and Salvador) have called upon "all the parties" to internal disturbances and civil wars to respect human rights. One resolution of the Subcommission in August 1993 went further in condemning explicitly the Peruvian insurrectional movement "Shining Pass".

It is essential to extend this approach. Regarding non-treaty procedures, ECOSOC resolution 1235 (XLVII) of 1966, which instituted the UN periodic public debates on violations "wherever they occur", may offer scope for monitoring non-state powers. Treaty mechanisms of the Protocol to the Civil and Political Rights Covenant, the Torture Convention and CERD raise more problems, as they are expressly centred on the State

as respondent. Rather than resorting to the cumbersome amendment procedure, the best approach may be to provide in Protocols for the responsibility of non-statal groups, targeted as precisely as possible. Incrementalism—one protocol for each type of group as the need for regulation is increasingly felt—would be advisable.

At the supra-national level, an ongoing project is to guard against possible human rights infringements by the European Union through its adhesion to the European Convention on Human Rights. It would be desirable to apply the same approach with a view to securing the Union's adhesion to the Covenants and some other UN Treaties, as the latter instruments have a larger scope than the European Convention.

One of the more significant progresses towards individualizing—and strengthening—international deterrence on Human Rights would be the establishment of a permanent International Criminal Court inspired by Nuremberg Law. The subject is of such importance that it calls for a distinct section, below.

III. Towards an International Criminal Court

Nuremberg law was excluded from the Charter of the United Nations and the Organization's activities, largely through the paralysing effect of the East-West "cold war". Now this major source of tension no longer exists, work has resumed in the International Law Commission, on establishing a Permanent International Criminal Court. In fact, the Commission did submit the first Draft Statute for such a Court to the General Assembly in 1993.

As the present ILA Conference is benefitting from the comments of Professor Crawford, a distinguished member of the I.L.C. and prime author of the Draft Statute, I shall not dwell on the subject. The Court would apparently be competent to punish persons guilty of massive and/or most serious violations of Human Rights already defined in treaties as international crimes, such as the "grave breaches" of the Geneva Conventions on the crimes against humanity proclaimed in the Genocide of 1948, the Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, and the Anti-Apartheid Convention of 1973. Furthermore, since its jurisdiction ratione materiae is foreseen to be open-ended, other grave violations of human rights which may be regarded in the future as international crimes—perhaps some particularly serious violations of economic and social rights or of International Environmental Law—would also be covered.

A fundamental element of the Court Statute, taken over from Nuremberg Law, is to target individuals, even heads of State or persons acting in official capacity, as well as non-state, definable groups. If only in that respect, the future Court would go a long way indeed towards making International Human Rights Law more realistic and dissuasive, as outlined in the preceding section.

A further breakthrough—which we hope will not remain quite utopian forever!—would be to provide for the direct access of individuals and NGOs as plaintiff to the Court, under appropriate criteria for admissibility.

Existing UN HR Treaty—bodies could conceivably, in certain cases, at least, become examining organs of first jurisdiction, ruling on admissibility and carrying out preliminary inquiries, under the Court's supervision. This would have the advantage of bringing the individual into the system, even if his direct access to the Court were ruled out. The structure would then somewhat resemble those of the European and Inter-American systems. Such a reform might be achieved, hopefully without undue legal complications, through appropriate protocols to existing treaties and/or the Court Statute.

IV. The Issue of Urgency: "Mission Impossible"?

The preservation of human rights, like that of peace of which it is a prerequisite, requires urgent, even immediate action in the face of major crises. The large-scale atrocities in Somalia, Kurdistan, Bosnia and so many others, highlighted by the media, have strongly bolstered this demand on the part of the public. The need for quick response by the UN will be much greater in the future since mass Human Rights violators—state and non-state—will benefit from more efficient technology to commit their crimes.

Although the length and number of their meetings is increasing, the sessions of the human rights bodies are subject to severe budgetary constraints and to the limitations of the calendar of conferences. Only in 1990, by resolution 1990/48, did the Council authorize the Commission to meet exceptionally between its regular sessions. This new rule was applied on 10 August 1992 for the question of Bosnia, five days after the request was made by a State member: the action was as rapid as possible in view of the problems of communication, although five days might prove to be too many in several circumstances.

Provision should at any rate be made for some inter-sessional powers of the Chairmen, Bureaux or Secretariats. This necessity has been clearly perceived by the Inter-America Commission on Human Rights, whose rules of procedure seem to permit substantial inter-sessional action (see, for example, Arts. 9. 26 C3, and 27). A similar trend can be seen in various ILO organs and in the European Commission. This is in sharp contrast to the attitude of the United Nations human rights bodies. Ever since their inception, they have shied at delegating the slightest jurisdiction, even of pure routine, to their officers, to a rapporteur or a fortiori to the Secretariat. It is typical, for example, that when the UN Human Rights Committee adopted its rules of procedure in 1977, it formally rejected a draft article from the Secretariat which had made provision for such delegation. Only during the last three years has the Committee taken some steps in this direction: the appointment of a special rapporteur to request a suspension as an interim measure in the case of death sentences; the authorization for its Working Group on communication, meeting immediately before the plenary, unanimously to declare a complaint admissible without reference to the Committee; and lately, the appointment of a special rapporteur to perform some initial procedural functions between sessions, basically the transmittal of complaints to the Governments concerned for comments on admissibility.

This trend should be intensified by assigning to the officers of the Committee or to a rapporteur inter-sessional duties similar to those in effect under regional systems. This shortcoming on the part of the United Nations flows clearly from the high degree of mutual distrust between so many Member States as compared with the relative ease of decision-making within the smaller and more homogeneous regional bodies. The situation is nevertheless very detrimental to the credibility of UN procedures. Let us hope that increasing public outrage shall soon prompt the UN to fully overcome this weakness.

V. Stronger Deterrence?

A. Towards a Revitalized International Court of Justice

Leaving aside the jurisdiction of an international criminal court which would be exceptional, efforts should be made to revitalize the International Court of Justice with regard to international human rights law. Its importance in this field has been unfortunately greatly reduced by its loss of favour in the eyes of States. First, in 1966, the Third World States lost faith, and for a long time, after the aborted Namibian case. As a result, no clause of compulsory jurisdiction is to be found in the Covenant and other treaties. Lately, Western countries appear to signal misgivings for other reasons. The Secretary General's recommendations to promote the jurisdiction of the Court should be supported. Despite his appeal in "Agenda for Peace", the Vienna Declaration contains a microscopic weak reference to the World Court.

Ideally, one way—still, I fear, very much an utopian way—of resuscitating the Court in the Human Rights field would be to provide for access of the individuals and groups aggrieved under suitable conditions. Even assuming the political will for it exists somewhere, this would require fundamental amendments to the Statute, a nearly impossible task.

Another—slightly less utopian—strategy would be to promote much more frequent requests for Advisory opinions from the General Assembly and, by delegation, from various UN Human Rights organs.

Furthermore, the practice might be encouraged to develop in UN organs to consider by consensus the Court's Opinions—on most important HR issues, such as Genocide or "ethnic cleansing"—as legally binding. The HR Committee and other treat-bodies could conceivably play a role in such a process: they might, as they would feel necessary, try to persuade the General Assembly—to which they directly or indirectly report—to ask Advisory Opinions on basic problems concerning the interpretation of the treaties. A major risk would be, of course, that UN HR bodies transfer abusively their responsibilities to a compromise—prone World Court. The countervailing advantage would be that individual plaintiffs present before the HR Treaty-bodies would thus have some indirect access to the World Court. Perhaps one way of solving the dilemma would be for the Treaty-bodies to ask, via the GA, for an Advisory Opinion only upon the clear request of the individual plaintiff.

Such plans, and many others which have been suggested with the same goals, appear to be unrealistic for the time being, in view of the paucity of active support for the Court which persists in many quarters within the UN membership.

This is all the more regrettable, as the World Court seems in recent cases to have taken a firmer stand on Human Rights issues.

B. Collective Sanctions for Mass Violations of Human Rights

Role of the Security Council

Recourse, under Chapter VII, to mandatory sanctions to protect human rights—diplomatic and economic sanctions and, as a last resort, the use of armed force by the United Nations—has also been tried at the United Nations. In order to justify such recourse, reference has rightly been made to the basic link, recognised in the Charter, between the maintenance of peace and respect for human rights. However, these attempts, mostly by the African Group of States, have been only very partly successful: the economic blockade on the Smith regime in Rhodesia, the embargo on offensive weapons for South Africa. The vast majority of attempts were stopped by vetoes. The practice persists to some extent even after the end of the Cold War.

The recent events in Iraq and Yugoslavia and some of the Security Council's decisions concerning those regions have led to strong hopes in public opinion. There has been talk in this connection of the emergence of a "right of intervention" or indeed of a "duty" of intervention by the United Nations for massive violations of human rights. An analysis of these decisions and of the preparatory work for them seems, however, to indicate a persistent will to link economic sanctions and the sending of United Nations armed forces essentially to the question of the free conveyance of humanitarian assistance to the Kurdish minorities on the one hand, and to the besieged Bosnian towns, on the other. Sanctions or warnings clearly and distinctly on account of human rights violations have not apparently been decided upon under Chapter VII.

Support should be given to the recommendations of the fourth meeting of chairpersons of treaty bodies aimed at encouraging the Security Council to take into account, on a continuing basis, major human rights problems as helping to create a likely and serious risk of a threat to peace. The United Nations monitoring bodies should be encouraged to bring such situations to the attention of the Security Council. They could in any case do so through the General Assembly, which has statutory relations with the Council (Arts. 15 and 16 of the Charter). The Secretary General could bring such situations to the attention of the council at any time, under Article 99 of the Charter.

However, one should not place undue hopes on the mutation of the Security Council into a Human Rights deterrence organ. This is a highly political organ, sensitive above all to power relations. Furthermore, present, trends towards granting veto rights to more States would not make decision-making easier, especially on Human Rights issues which

raise the dual problem of being politically sensitive and some say—only of marginal Security Council jurisdiction.

The Vienna Declaration, although it contains no word expressly denying the need for strong Human Rights deterrence and pays lip service to strengthening the UN HR system in general, shows a prevailing trend not supportive of far-reaching reforms towards compulsory decisions. The emphasis was rather on the need to maintain friendly relations between equally sovereign States and to ensure respect for territorial integrity.

VI. The Actors of the United Nations Human Rights System: Dysfunctional Trends?

In the UN Human Rights System, decision-making is at present a multipolar process. It involves: Governments; independent "experts" nominated by states but elected by UN bodies in a personal capacity; and NGOs in consultative status, which seek to ensure meaningful communication between the peoples and the United Nations.

This balanced system has lead to a creative dialogue. It begins to show, however, dysfunctional trends.

States, wary of the growing power of experts and NGOs, seek to reduce their influence. As was done for the Crime Prevention committee, they eliminate some experts' bodies and replace them by "Government experts" under state control. The effectiveness of NGOs is being eroded—for instance at Vienna—through the increased use of closed sessions, restrictions upon speaking opportunities and other means. One had buried the Sovereign State too early.

Furthermore, experts and NGOs are weakened through factors specific to these classes of actors. One basic problem regarding experts flows from the fact that many of them also act as representatives of their Governments in other UN bodies. In the public eye, their image of independence is therefore marred, in spite of the high level of personal integrity of UN experts generally.

This will be especially damaging in tomorrow's world, where inter-group distrust will make faith in independent arbiters more crucial than ever.

As revealed or confirmed at the Vienna Conference, a deep chasm exists between transnational NGOs in consultative status and grassroot associations of Human Rights defenders. The former, thoroughly familiar with UN procedures, have a strongly positive impact upon the Human Rights activities of the organization. Yet, grassroots associations, confronted with the daily fight for justice and impatient with UN mechanisms, tend to resent the status of NGOs as part of an inter-governmental "establishment" to remote from popular roots. Some trends have appeared among local groups towards rejection of a world NGO structure and a retreat into the regional and sub-regional spheres.

A divided NGO movement along these faults would be a tragedy for Human Rights. Reconstruction efforts through mutual understanding and recognition from both sides—status and grassroots NGOs—must be a high priority among Human Rights defenders all over the world.

Last but not least, the United Nations Secretariat could play an important role of implementation, harmonization and guidance in the Human Rights System. It has indeed taken a major—though largely hidden—part in such achievements as the drafting of the Universal Declaration of Human Rights in 1948, the adoption of the Covenants in 1966, the progress of the Technical Assistance programmes from 1955 up to now, and, in 1993, the difficult—and finally successful—consensus-building for the Vienna Declaration.

These achievements are all the more remarkable in view of the problems which the Secretariat must increasingly face: grossly insufficient funding by Member States; understaffing; growing external influences for recruitment, placement and promotion; and consequent demoralization of staff.

To sum up, the over-all trend appears to be one of gradual disequilibrium, directly or indirectly strengthening governments and weakening non-state sectors. Reverting to a multipolar, balanced structure would be an important condition for UN efficiency in the emerging world. Indeed the Organization, more than ever, will need a pluralistic debate to understand and address the Human Rights issues and prevent the conflicts of Tomorrow.

Conclusions

The United Nations Human Rights System has gone through many changes, beyond the legal constraints of the Charter. It must undertake again—and quickly—a major mutation, lest it becomes a wasteland in the emerging world.

I hope to have shown that most of the essential reforms can be achieved through changes in approach and practice, without need for Charter amendments. The Vienna Declaration places a renewed emphasis on mutual respect for cultural and political differences, and on non-selectivity, but it does not in itself prevent the reform of the UN Human Rights System. In some respects, it showns support for innovative changes.

The decision of the General Assembly on 20 December 1993 to establish a UN High Commissioner for Human Rights may constitute an important first step towards quicker responses and a more preventive system. As a global ombudsman, the High Commissioner is empowered to initiate "contacts" and "dialogue" with governments at any time. He is expected to "play an active role" not only in remedying violations but, further, in "preventing" them. Should he fail to persuade States, he would recommend further action in public reports to the Commission and the General Assembly.

Such progress, however, would not happen automatically. To attract consensus, the mandate is drawn in broad terms and sometimes in self-contradictory language. All will depend upon the strong, innovative practice which the High Commissioner would no doubt seek to develop, and upon the resources which he would be able to obtain from Member States.

The basic ambiguity of the mandate resides in the High Commissioner's dual obligation to "promote" human rights through a "dialogue" with Governments, while respecting also "... the domestic jurisdiction of States". Uncooperative Governments might

try to use that proviso to tolerate only the most formal and perfunctory "dialogue", excluding all specific fact-finding and exhortation.

Under such a mandate, it might require great efforts of negotiation to obtain the right to conduct comprehensive inquiries *in situ* and, even more so, to outpost permanent or long-term observers on the spot. Yet we believe that a permanent UN presence is the main requirement for effective prevention.

Also, the GA resolution is silent on the crucial subject of the sources and methods of information of the High Commissioner. UN Special Rapporteur's practice would suggest that he could have a rather broad leeway to gather data within the UN system, contact IGOs and NGOs, receive petitions and hold oral hearings. How far could he go, however, without being accused of infringing "domestic jurisdiction"? The Special Rapporteurs' mandates do not contain explicitly such limitations. A host of issues would need to be tackled with special care in clearly drafted guidelines or rules of procedure, such as the possibility of utilizing UN confidential material (under res. 1503 for instance), the conditions of admissibility of petitions, the criteria governing the choice of witness, guarantees of hearings *in situ* free from State influence, and measures to ensure the protection of witnesses. Clear guidelines on such matters are essential for the full credibility of the system.

Finally, emphasis is placed in the mandate upon the mission of the High Commissioner to ensure the "rationalization" and "streamlining" of the UN Human Rights machinery. This has been for long a popular idea in UN circles. Indeed this empirically-grown system is overly complex, cumbersome and ridden with duplication. Coordination must be intensified. Let us beware, however, that "streamlining" plans do not become obsessive efforts at unification.

In a totally unified Human Rights system, the losers may be those that we seek to protect, the victims of Human Rights violations. At the international level where the odds under all procedures are still so strongly against the plaintiff, the pluralism of recourses is a crucial guarantee for a minimum justice.

Let us express our faith that the High Commissioner shall make the most effective and wise use of his mandate to bring about a true culture of Human Rights on Vessel Earth.

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Internally Displaced Persons as Refugees

I. Introduction

Due, in particular, to the large media coverage of the plight of the Kurds in Northern Iraq after the (second) Gulf War, the international public became—at last—fully aware of the problem of internally displaced persons.[1] Internally displaced persons may be described as such persons who have been force to leave their homes or have been forcibly removed from their homes to another part of their country whereas externally displaced persons are outside their country of origin (or previous habitual residence); thus, refugees in the sense of the universally applicable 1951 Refugee Convention or in the sense of any regional instruments such as the 1969 OAU Convention or the 1984 Cartagena Declaration belong to the latter group. The current wars in former Yugoslavia added to the international, in particular European, awareness of this issue of internally displaced persons. In 1991, more than 24 million people throughout the world were internally displaced as a result of various causes such as e.g. forcible movements to inhospitable areas, civil strife and civil war and ethnic persecution as part of governmental policies.[2] Given the

1 It should be emphasized, however, that the phenomenon of internally displaced persons is by no means a recent one; as a result of the civil wars in many areas of Africa, Asia and Latin America, there have always been, at least during the last decades, large numbers of persons who had been forced to leave their homes in order to seek refuge in another part of their country; in some cases, UNHCR (and other governmental organizations) and, in particular, non-governmental organizations provided assistance and protection to such persons, usually on an ad hoc basis.

2 See CUENOD, J.: Report on Refugees, Displaced Persons and Returnees, UN Doc. E/109/Add. 1 (1991).

more recent developments in e.g. Bosnia-Herzegowina, Croatia, Liberia, Somalia and several of the successor states of the former Soviet Union (to mention only the most known countries with a large population of internally displaced persons), it might be estimated that, in the meantime, this number has increased quite considerably. Notwithstanding this development, the issue of internally displaced persons is still not directly addressed by any international instrument which explains to some extent the *ad hoc* nature of the international community's response to this problem. It is, however, increasingly recognised that this failure of the international community to appropriately address this issue may result (and indeed results) in a serious threat to the internal stability of states, since those persons who do not receive assistance and protection in their own country will seek such assistance and protection (as refugees)[3] in other countries. Such movements might result in a serious economic, political and social destabilization of the countries of refugee concerned and, thus, in a threat to peace and security in a whole region.

The absence of any adequate legal machinery for the protection of internally displaced persons and the scarcity of pertinent scholarly discussion of this issue[4] prompted the ILA recently to establish its Committee on Internally Displaced Persons. The following paper is meant to serve as a basis for the future work of this Committee.

II. Scope and Factual Background of this Paper

There is—as yet—no consistent and generally accepted definition of the term *internally displaced person.*[5] Obviously, this term excludes such persons who are *externally displaced,* persons who seek assistance and protection outside the boundaries of their own countries irrespective of whether they are qualified as refugees under any international legal instrument. It is suggested that, more precisely, internally displaced persons can be divided into two—admittedly rather broad—categories: Those who are forcibly removed from their homes and resettled in another area by governmental or opposition forces within their own country; and those who (are forced to) move to another area within their

3 According to recent estimations, the current number of refugees throughout the world exceeds 18 million people, see UN Doc. E/1993/20.

4 See, however, LEE, L.: Legal Status of Internally Displaced Persons, Proceedings of the 86th Annual Meeting of the American Society of International Law (1993), pp. 630 et seq.; LEWIS, C.: Dealing with the Problem of Internally Displaced Persons, Georgetown Immigration Law Journal 6 (1992), pp. 693 et seq.; NANDA, V.: International Law and the Refugee Challenge: Mass Expulsion and Internally Displaced People, Willamette Law Review 28 (1992), pp. 791 et seq. and recently DENG, F.: Comprehensive Study on the Human Rights Issues Related to Internally Displaced Persons (1993).

5 It should be mentioned, however, that the UN Secretary-General used this term "to refer to persons who have been forced to flee their homes suddenly or unexpectedly in large numbers; as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country", see UN Doc. E/CN.4/23 (1992).

own country due to ethnic persecution or other human rights violations, civil strife or war, or other reasons.

This definition would cover also such persons who are removed or move as a result of natural or man-made disasters. It is suggested, however, that the scope of the work of this Committee should not include such persons for the following reason: Internally displaced persons are of interest to the international community mainly because they lack assistance and protection from their own government. Although natural or man-made disasters may cause the internal displacement of civilians, they generally do not result in a state depriving its citizens of such assistance and protection as necessary to allow them to remain in their homes or to survive if they do become displaced; moreover, in the case of most natural or man-made disasters, states are generally prepared to extend available internal resources and receive foreign assistance to help persons displaced for such reason.[6]

Therefore, it is suggested that the scope of the work of this Committee should cover (only) those persons who are internally displaced on the grounds of (1) forcible displacement as a result of government or opposition actions, or (2) ethnic persecution or other systematic violations of fundamental human rights, or (3) armed conflicts such as civil strife and civil war; and who are subject to governmental policies excluding them from receiving internal or foreign assistance.

As to the factual background of the issue of internally displaced persons, it is to be repeated that, due to most recent developments, the above-quoted number of 24 million internally displaced persons does not reflect reality which might be close to 30 million people; regardless of the figures used, the magnitude of these numbers becomes even more striking when compared to the smaller figure of "only" 19 million refugees. The fact that such refugees (or externally displaced persons) are covered by a relatively extensive and fairly efficient system of international protection whereas internally displaced persons do not benefit from such a system of protection based upon binding legal instruments, just adds to the plight of internally displaced persons.

With a view to the apparently deteriorating situation in many successor states of the former Soviet Union and to the only limited prospects for a lasting solution to the conflicts within, in particular, Angola, Liberia, Mozambique, Somalia, Sudan, some Central American countries, Afghanistan, Iraq, Sri Lanka, Croatia and Bosnia-Hercegowina, there does not seem to be any realistic hope for a considerable decrease in the number of internally displaced persons in a foreseeable future.

It is now generally accepted[7] that international refugee law does not only deal with the imminent protection needs of refugees but addresses also the *root causes* of refugee movements and the question of durable solutions to refugee situations, in particular voluntary repatriation if and when such root causes have ceased to exist. It is suggested that the work of this Committee should follow this pattern of current refugee law and,

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6 This point has been rightly emphasized by C. Lewis (supra note 4), at p. 694.

7 See only UNHCR, The State of the World's Refugees. The Challenge of Protection (1993), pp. 1 et seq.

consequently, address the causes for internal displacements, look for possibilities of efficiently protecting internally displaced persons and, finally, discuss possible solutions for such situations.

III. Root Causes of Internal Displacement and Their Legal Context

Corinne Lewis rightly states that "the fact that such a large number of people are internally displaced as a result of forcible displacement, persecution, or civil war suggests that there is a problem in the protection afforded to these people under international law".[8]

Therefore, the following section deals, firstly, with the violations of international law which cause such displacement and, secondly, with the apparent deficiencies of international law in this context.

1. Violations of International Law as Root Causes for Internal Displacement

The major areas of international law norms the violation of which cause internal displacements are human rights and humanitarian law.

a) Forcible displacements are characterized by governmental actions moving parts of the population of a state to another area of that state in order to better control the people concerned who are usually considered as opponents to the government in power, or in order to weaken (armed) opposition to that government. Such policies will—as a rule—infringe upon the right to liberty of movement and freedom to choose a residence as guaranteed under Art. 12 of the 1966 International Covenant on Civil and Political Rights[9] and respective provisions of other human rights instruments applicable on the universal or regional level.[10] In specific cases, such policies violate, moreover, a whole range of other human rights such as the right to personal liberty, privacy or, in extreme cases, even the right to life.

b) A major reason for internal displacement is persecution based upon ethnic or other grounds; such persecution takes a variety of forms and may, thus, constitute violations of numerous human rights such as the right to life; freedom from torture; freedom from arbitrary arrest or detention; the right to a fair trial; the right to privacy; freedom of thought, conscience and religion; freedom of expression; the right to peaceful assembly; freedom of association; the right not to be subjected to discrimination including the whole set of rules constituting the rights essential for the protection and promotion of the

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8 LEWIS, C. (supra note 4), at p. 696.

9 As to this provision see NOWAK, M.: U.N. covenant on Civil and Political Rights. CCPR Commentary (1993), pp. 197 et seq.

10 See in particular Art. 2 of the 1963 4th Additional Protocol to the 1950 European Convention on Human Rights, Art. 22 of the 1969 American Convention on Human Rights and Art. 12 of the 1980 Afrian Charter on Human and Peoples' Rights.

distinct identity of any national or other minority. Generally speaking, these are the same rights the violation of which is usually considered as resulting in a well-founded fear of persecution as mentioned in most definitions of the term "refugee". However, whereas "refugees" as persons who are forced to be outside their countries of origin for such well-founded fear of persecution are protected by an international legal structure offering assistance and protection, internally displaced persons do not benefit from such a system.

c) The most important root causes for internal displacements are, however, (internal) armed conflicts which often coincide with forcible displacements and human rights violations as just described. Almost all of the countries with large numbers of internally displaced persons are the sites of internal (or internationalized internal) armed conflicts.[11] Such internal armed conflicts will force civilians to move in order not to be caught in the crossfire or to escape from human rights violations committed by governmental or insurgent military forces. It should be stressed, however, that armed conflicts are rightly considered as situations allowing for restrictions on human rights as enshrined in the pertinent international instruments; it is, on the other hand, equally important to stress that fundamental human rights are generally considered not to be subject to any derogations even in cases of national emergency.

In addition to (general) human rights law, persons living in areas raged by internal conflicts are protected, at least to some extent, by provisions of international humanitarian law applicable also to such internal conflicts.[12] The most important are Art. 3 of each of the four 1949 Geneva Conventions (common Art. 3)[13] and the provisions of the 1977 Second Additional Protocol to the Geneva Conventions (Protocol II) which apply to persons in a country which is the site of an internal armed conflict. Under common Art. 3 and Protocol II, persons who are actively taking part in the conflict are to be "treated humanely". Consequently, the state as well as the opposing party or parties are under an obligation to respect certain fundamental rights of such persons.[14] Thus, under common

11 For details see LEWIS, C. (supra note 4), at pp. 699 et seq.

12 See e.g. SCHINDLER, D.: The Different Types of Armed Conflict According to the Geneva Conventions and Protocols, Recueil des Cours 163 (1979 II), pp. 121 et seq.; CASSESE, A.: La querre civile et le droit international, Revue Générale de Droit International Public 90 (1986), pp. 553 et seq.; GASSER, H. P.: Armed Conflict Within the Territory of a State, in: Festschrift für Dietrich Schindler (1989), pp. 225 et seq. and MYREN, R. S.: Applying International Laws of War to Non-International Armed Conflicts: Past Attmepts, Future Strategies, Netherlands International Law Review 37 (1990), pp. 347 et seq.

13 See e.g. ABI-SAAB, G.: Droit humanitaire et conflits internes (1986), pp. 50 et seq. and VEUTHEY, M.: Les conflits armés de caractère non-international et le droit humaintaire, in: A. Cassese (Ed.), Current Problems of International Law (1975), pp. 179 et seq. (at pp. 209 et seq.).

14 See e.g. GASSER, H. P. (supra note 11), at pp. 237 et seq. and KALSHOVEN, F.: Applicability of Customary International Law in Non-International Armed Conflicts, in: A. Cassese, ibid., pp. 267 et seq. (at pp. 281 et seq.).

Art. 3,[15] the parties to the conflict are prohibited from committing any violence to any person, such as mutilation, cruel treatment and torture and any "outrages upon personal dignity, in particular humiliating and degrading treatment". Protocol II[16] also prohibits

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15 This provision reads: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict".

16 Of particular relevance are the following provisions:

Art. 13 reads: "(1) The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed as a minimum.

(2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

(3) Civilians shall enjoy the protection afforded by this Party, unless and for such time as they take a direct part in hostilities".

On this provision see e.g. JUNOD, S. S. in: V. Sandoz–C. Swinarski–B. Zimmermann (Eds.), Commentary on the Additional Protocols (1987) at pp. 1449 et seq. and SOLF, W. in: M. Bothe–K. J. Partsch–W. Solf, New Rules for Victims of Armed Conflicts (1982), pp. 676 et seq.

Art. 14 reads: "Starvation as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works". See JUNOD, S. S. ibid., pp. 1456 et seq. and SOLF, W. ibid., pp. 680 et seq.

Art. 15 reads: "Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population".

Art. 16 reads: "Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any actis places of workship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort". See JUNOD, S. S. ibid., pp. 1467 et seq.

Art. 17. reads: "(1) The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such dis-

the parties to the conflict from using the civilian population as the object of armed attacks, from committing "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" and from starving civilians as a method of combat. They are, moreover prohibited from committing "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, ... and assault" and from imposing the death penalty on children under eighteen at the time of the offense or on pregnant women. Considering the well-known, outrageous atrocities committed in most current and previous internal conflicts, it is obvious that these rules of humanitarian law, as well as others, are most often disregarded by the Parties to the conflict with the intent of gaining military advantages.

Moreover, civilians are often victims of forcible displacements which take place in order to deprive insurgents of assistance and support. Such displacements constitute a violation of Art. 17 of Protocol II "unless the security of the civilians involved or imperative military reasons so demand".

2. Failure of International Law to Adequately Address the Root Causes of Internal Displacement

It results from the foregoing that international law does provide for a system of rules to protect persons from forcible displacement, persecution and other gross violations of fundamental human rights outside and within the context of internal armed conflicts. However, reality shows that this system is not efficiently working and does not serve to prevent the causes of displacement. This fact results from the incomplete nature of this protection machinery, in particular the deficiencies of the international legal system as regards the implementation and enforcement of states' obligations under human rights and humanitarian law.[17]

a) One aspect of the incompleteness of this protection machinery stems from the fact that not all states are members of the relevant international instruments. This applies in particular to the 1966 International Covenant and the Protocol II, whereas the 1949

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placements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

(2) Civilians shall not be compelled to leave their own territory for reasons concerned with the conflict". See SOLF, W. ibid., pp. 690 et seq.

Art. 18 reads: "(1) Relief societies located in the territory of the High Contracting Parties, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

(2) If the civilian population is suffering undue hardship owing to a lack of the supplies essential for their survival, such as foodstuffs and medicial supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned".

17 On this issue see only PARTSCH, K. J.: Human Rights and Humanitarian Law, in: R. Bernhardt (Ed.), Encyclopedia of Public International Law, Instalment 8 (1985), pp. 292 et seq.

Geneva Conventions and other instruments, such as in particular the Genocide Convention, are in force in virtually all countries.

This leads to the question whether and to what extent the provisions of those instruments which lack quasi-universal membership may, however, be considered to represent customary international law, and with regard to some rights even *jus cogens*,[18] thereby binding upon all states irrespective of whether these are in fact members of the relevant instrument. This question cannot be adequately dealt with in the framework of this paper; it is suggested, however, that such fundamental human rights as the right to life, freedom from torture, right to a fair trial, the prohibition of discrimination based upon racial and religious grounds, and the obligations specified in common Art. 3 have the legal status of customary international law.[19]

Another issue calling for further thorough consideration is the question whether and to what extent states are entitled to restrict the scope of their obligations under these instruments, in particular as regards the substantive provisions of the relevant human rights treaties, or even derogate from their obligations in times of situations of national emergency. This problem results mainly (or to a very considerable extent) from the fact that, on the universal level, there is in many cases no international supervisory organ authorized to interprete, with binding force upon all member states of the treaty in question, the substantive provisions of such treaties and to define their exact contents.

Another aspect of the incompleteness of the existing protection machinery concerns the fact that the 1949 Geneva Conventions and their Additional Protocols are not applicable to civilians during certain internal conflict situations: If the internal conflict is not to be considered as an internal armed conflict under common Art. 3 or Protocol II, these rules are inapplicable. Consequently, state governments may be tempted to label a conflict a riot or an isolated or sporadic act of violence, which would, therefore constitute only an internal disturbance or tension rather than an internal armed conflict, and thereby avoid the applicability of common Art. 3 and the provisions of Protocol II; this situation is aggravated by the fact that there is no mechanism for determining, with binding force upon the parties concerned, whether a situation of internal conflict qualifies as an internal armed conflict in the sense of international humanitarian law.

b) In addition to these shortcomings of the existing protection system, there is, as in all fields of international law, the issue of implementation or enforcement of a state's obligations. Notwithstanding the fact that the human rights instruments relevant in situations of imminent or ongoing internal displacements do provide for mechanisms to protect the individuals concerned, it is suggested that such mechanisms, simply due to their structure, fail to offer prompt relief for any internally displaced person or to avert the root causes resulting in a person becoming internally displaced.

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18 See FROWEIN, J. A.: Jus Cogens, in: R. Bernhardt (Ed.), Endyclopedia of Public International Law, Instalment 7 (1984), pp. 327 et seq. and HANNIKAINEN, L.: Peremptory Norms (jus cogens) in International Law (1988).

19 See MERON, T.: Human Rights and Humanitarian Norms as Customary Law (1989), pp. 41 et seq.

Furthermore, these mechanisms are not structured in such a way as to allow the international community to force a state to remedy situations of or resulting in internal displacements. It is a well-known deficiency of, in particular universal, human rights law that even if the relevant instrument provides for a complaint system available to individuals or other states, the subsequent findings of the bodies called upon to deal with such complaints are of a non-binding character. The efficiency of these systems is, moreover, considerably limited by the very slow and time-consuming character of the procedures to be followed which prevents them from constituting an effective mechanism to avert or to remedy situations of internal displacement.

Similar considerations apply with regard to international humanitarian law: Neither the 1949 Geneva Conventions nor Protocol II provide for any mandatory mechanism for bringing violations of the humanitarian law rules laid down in common Art. 3 and Protocol II to the attention of the international community or for enforcing the obligations resulting from these instruments. It is, moreover, a well-known deficiency of international humanitarian law that, whereas the International Committee of the Red Cross (ICRC) or any other governmental or non-governmental organization may offer their services to victims of internal armed conflicts, there is no provision which entitles such bodies to provide assistance and protection to civilians if the state concerned refuses to allow their officers access to these victims.

These facts link the issue of internal displacement to the general problem of determining how the international community should react to (widespread and systematic) violations of international law. This problem doubtlessly constitutes one of (if not the) the crucial issues to be addressed by practitioners and scholars of international law alike in this last decade of this century; it relates, inter alia, to the future role of the UN system, in particular the Security Council, in making use of the means offered by Chapter VII of the UN Charter,[20] the legal and political possibilities offered by the emerging rules of state responsibility,[21] the future role of the institute of humanitarian interven-

20 On this issue see e.g. CARON, D.: The Legitimacy of the Collective Authority of the Security Council, American Journal of International Law 87 (1993), pp. 552 et seq.; SCHACHTER, O.: United Nations Law in the Gulf Conflict, American Journal of International Law 85 (1991), 452 et seq.: URGUHART, B.: The UN and International Security after the Cold War, in: A. Roberts–B. Kingsbury (Eds.), United Nations, Divided World (2nd ed. 1993), pp. 81 et seq. and the contributions in J. Delbrück (Ed.), The Future of International Law Enforcement. New Scenarios (1993).

21 On this issue see e.g. HOFMANN, R.: Refugee-Generating Policies and the Law of State Responsibility, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 45 (1985), pp. 694 et seq.; SACHARIEW, K.: Les droits des Etats en matière de mesures de mise en oeuvre du droit international humanitarie, Revue Internationale de la Croix-rouge 71 (1989), pp. 187 et seq. and OETER, S.: Kriegsverbrechen in den Konflikten um das Erbe Jugoslawiens. Ein Beitrag zu den Fragen der kollektiven und individuellen Verantwortlichkeit für Verletzungen des Humanitären Völkerrecht 53 (1993), pp. 1 et seq.; generally see ZEMANEK, K.: Responsibility of States: General Principles, in: R. Bernhardt (Ed.), Encyclopedia of Public International Law, Instalment 10 (1987), pp. 362 et seq.

tion[22] and to the legal questions related to the concept of obligations *erga omnes*;[23] all these aspects of current international law raise intricate questions, in particular since the present practice of the international community and their competent organs is—according to this author's opinion—characterized by a most deplorable selective and partial approach which has severely damaged all expectations for the establishment of a "new world order" based upon universal observance and enforcement of the rule of international law as it seemed to become possible subsequent to the end of the Cold War.

IV. International Law and Situations of Internal Displacement

Whereas the previous section of this paper was devoted to the (inadequate) relation between international law and the root causes of internal displacement, this section deals with the deficiencies of current international law in addressing the effects of internal displacement and adequately responding to the needs of internally displaced persons.

1. Effects of Internal Displacement

Internally displaced persons as a most vulnerable group of people are in urgent need of food, water, shelter and medical care in order to survive; they also need protection against physical attacks and further gross violations of fundamental human rights. As stated above, current reality shows that governments will often deny such persons the necessary assistance and protection or refuse to allow other states or international organisations to provide such assistance and protection.

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22 On this issue see e.g. BEYERLIN, U.: Humanitarian Intervention, in: R. Bernhardt (Ed.), Encyclopedia of Public International Law, Instalment 3 (1982) pp. 211 et seq.; VERWEY, W.: Humanitarian Intervention, in: A. Cassese (Ed.), The Current Legal Regulation of the Use of Force (1986), pp. 57 et seq.; BAZYLER, M. J.: Re-Examining the Doctrine of Humanitarian Intervention in Light of the Atrocities in Kampuchea and Ethiopia, Stanford Journal of International Law 23 (1987), pp. 547 et seq.; SPERDUTI, G.: Protection Domestic Concerns of States, Annuaire de l'Institut de Droit International 86 (1989), pp. 309 et seq.; BETTATI, M.: Un droit d'ingérence?, Revue Gènèrale de Droit International Public 95 (1991), pp. 639 et seq.; MALANCZUK, P.: The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War, European Journal of International Law 2 (1991), pp. 114 et seq.; id., Humanitarian Intervention and the Legitimacy of the Use of Force (1993); SCHERMERS, H. G.: The Obligation to Intervene in the Domestic Affairs of States, in: Essays in Honour of Frits Kalshoven (1991), pp. 583 et seq.; FRANCK, T. M.: The Emerging Right to Democratic Government, American Journal of International Law 86 (1992), pp. 46 et seq.; RODLEY, N.: Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework, in: N. Rodley (Ed.), To Loose the Bonds of Wickedness: International Intervention in Defence of Human Rights, pp. 14 et seq.; ADELMAN, H.: Humanitarian Intervention: The Case of the Kurds, International Journal of Refugee Law 4 (1992), pp. 4 et seq. and LILLICH, R. B.: Humanitarian Intervention through the United Nations: Towards the Development of Criteria, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 53 (1993), pp. 557 et seq.

23 See e.g. FROWEIN, J. A.: Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung, in Festschrift für Hermann Mosler (1993), pp. 241 et seq.

Notwithstanding the clear prohibition of using starvation as a means of warfare also in internal armed conflicts,[24] food and other assistance for internally displaced persons are often used as a strategic weapon to gain advantages in internal armed conflicts. It is suggested that, from a human rights point of view, such governmental policies constitute a clear violation of the right to life and physical integrity of the victims of such policies and, it is additionally suggested, thereby a violation of human rights norms having the status of *jus cogens*. As to humanitarian law, it is to be stressed that, whereas common Art. 3 and Protocol II prohibit the starvation of civilians as means of warfare and provide that wounded and sick persons shall receive appropriate medical care and attention, they do not, however, provide for a unambiguous obligation to provide food, medical or other assistance to civilians during an internal armed conflict unless such persons are interned or detained.

In all internal armed conflicts, internally displaced persons are a primary target of acts of physical abuse and violence. Such acts clearly contravene rights guaranteed under human rights law and obligations of the parties to such conflicts under humanitarian law.

2. The Failure of International Law to Adequately Address the Effects of Internal Displacement

It appears from the foregoing that international human rights and humanitarian law provide for a system of protection for internally displaced persons which, although far from being complete and showing several serious deficiencies, should serve as a generally satisfactory framework for ensuring the sheer survival of (most) internally displaced persons. Reality shows, however, the (at least partial) failure of international human rights and humanitarian law to implement and enforce this system.

This is partly due to the same reasons which explain the failure of international law with respect to the implementation and enforcement of those international norms deemed to prevent the occurrence of situations of internal displacement, i.e. the apparent deficiency of international law to force unwilling states to respect their international obligations.

An additional factor of, however, extreme importance is the already mentioned absence of any international instrument establishing an unambiguous right of internally displaced persons to assistance and protection or defining the obligations of the international community in this context. Therefore, the international community had and has to deal with these problems on an *ad hoc* basis. The problem is further aggravated by the fact that, notwithstanding some recent action of the UN Security Council in the context of the conflicts in the former Yugoslavia, there is still no international

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24 See e.g. MACALISTER-SMITH, P.: Protection de la population civile et interdiction d'utiliser la famine comme méthode de guerre, Revue Internationale de la Croix-rouge 73 (1991), pp. 464 et seq. and DINSTEIN, V.: Siege warfare and the starvation of civilians, in: Essays in Honour of Frits Kalshoven (1991), pp. 145 et seq.

organisation clearly responsible for providing such assistance and protection. Among the numerous UN agencies involved, UNHCR seems to emerge as the main actor, whereas the ICRC, for obvious reasons, plays a key role among the various non-governmental organisations involved; it is, however, not completely clear whether there is, in fact, sufficient co-operation between these bodies or whether their activities suffer from unnecessary competition and the lack of adequate co-ordination between them.

Another important aspect not yet resolved by the international community consists of the apparent problems in getting food and other assistance to all internally displaced persons in situations of internal armed conflict. This was and is particularly true with respect to the armed conflict in Bosnia-Herzegowina. Even the ICRC is facing this problem, in spite of its international reputation for absolute neutrality, its long-standing experience of negotiating solutions in seemingly dead-locked situations and its generally accepted role as the primary provider of assistance to internally displaced persons.

It is, therefore, no surprise that the international community had to start considering ways and means of compelling the various parties to such conflicts to allow supply transport to reach those internally displaced (and other) persons in need thereof. The question, however, whether and to what extent actions such as the establishment of relief corridors and safe havens for internally displaced persons, or the delineation of no-fire-zones may actually contribute to ensure (a better) access to internally displaced persons in need of such assistance cannot be dealt with in the framework of this paper; the same applies to the discussion as to whether UN peace-keeping (and peace-enforcing) forces should play a more active role in this context, in particular as to the question whether and to what extent their mandate should include the right to the use of force in order to get such assistance to those people in need thereof.

A last important point to be mentioned in this context is the striking and very fundamental contrast between the level of assistance and protection available to externally displaced persons (refugees) and internally displaced persons. As stated above, international refugees law does not apply to the latter group of persons even though their fear of persecution is (more or less) identical to that of refugees. Furthermore, UNHCR leads and coordinates quite a sophisticated international legal and institutional framework providing for assistance and protection to refugees whereas internally displaced persons have only limited protection under human rights and humanitarian law and receive only *ad hoc* assistance and protection from states and international organizations which, moreover, must be organized and coordinated in each situation of internal displacement; this holds true notwithstanding recent efforts on the UN level and decisions aiming at an even more active involvement of UNHCR in remedying the plight of internally displaced persons.[25] Finally, mention should be made of the fact that current international law

25 See in particular General Assmebly Resolution 47/105, para. 14, and the recent conclusions of the Executive Committee of the High Commisioner's Programme, adopted at its 44th session, UN Doc. A/AC.96/821, para. 19 (s); see also the Opening Statement of the UN High Commissioner for Refugees at this

does not provide for any specific mechanisms to implement durable solutions to situations of internal displacement. Again, this fact constitutes a striking contrast to the legal and factual situation of refugees with regard to which there is long-standing experience and practice as to the means to bring about, secure and monitor the generally preferred durable solution, namely voluntary return or repatriation of refugees; there exists, as yet, nothing comparable with regard to internally displaced persons.

V. Conclusion

By way of conclusion, it seems justified to state that international law is not yet adequately dealing with situations of internal displacement. Such situations result not only in immense suffering on the part of the displaced persons, but increasingly tend to threaten the internal stability of the states concerned and peace and security in a given region of the world. Therefore, the international community is called upon to seriously consider means to deal with this issue in a more efficient way. It is suggested that this implies, firstly, to adequately address the root causes of internal displacements and secondly, to develop more efficient means to extend assistance and protection to internally displaced persons in situations when the government in place is unwilling to provide such assistance and protection or to allow another country or the international community to do so. In other words: What is needed is a thorough discussion of the possibilities of the international community as to how causes and effects of internal displacements might be more efficiently dealt with.

As regards possible improvements with respect to the root causes of internal displacements, the human right to be strengthened is the right to remain, or the right not to be forcibly displaced. This goal might be achieved by its explicit inclusion in the relevant human rights instruments.

Furthermore, the use of derogations, restrictions and exception clauses in international human right instruments should be more strictly construed and a state's pertinent practice be closely monitored.

Moreover, the international community must develop a stringent and politically unbiased, non-selective strategy as how to deal with the root causes of internal displacements. Options to be more intensively considered include the resort to peaceful (economic) sanctions against those states with policies generating internally displaced persons. Humanitarian interventions should be considered only as a last resort for preventing internal displacement. In line with recent developments, it is to be stressed that they should never be undertaken as a uni- or multilateral action without the explicit approval of the competent bodies of the UN or regional organisations.[26] Since humani-

session, UN Doc. A/AC.96/821 at 31.

26 As to the potential role of regional arrangements to maintain international peace and security see e.g. WOLFRUM, R.: Der Beitrag regionaler Abmachungen zur Friedenssicherung: Möglichkeiten und Grenzen, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 53 (1993), pp. 576 et seq. and NOLTE, G.:

tarian intervention is fraught with the risk of potential abuse, the standards for its deployment and operation should be very carefully developed.

As regards possible improvements with respect to the effects of internal displacements, the most pressing problem consists of ensuring the survival of the persons concerned. In this regard, the option of drafting a specific document establishing the rights of internally displaced persons to receive (international) assistance and protection (and a corresponding obligation of the international community to provide it) deserves further consideration. Furthermore, current trends aiming at bringing internally displaced persons under the mandate of a single international organization should be intensively studied. Given the similarities between refugees as externally displaced persons and internally displaced persons, an explicit extension of the mandate of UNHCR seems to be a viable solution given the long-standing experience of this organ in providing humanitarian assistance and protection; this does not mean, however, that the crucial role of ICRC should be changed. It is suggested that this extension of the mandate of UNHCR should be effected by specific provisions of the above-mentioned new instrument on the legal status of internally displaced persons.

Again, the option of resorting to peaceful sanctions and, eventually even to humanitarian interventions, in order to ensure that internally displaced persons in fact receive the necessary assistance and protection has to be studied very carefully, but may not be excluded.

Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 53 (1993), pp. 603 et seq.

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Budapest

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The Refugee Situation in Hungary: Where Now?

Hungary, approaching the turn of the millennium, has acquired a new role in international migration. In the forty years preceding and following the turn of the nineteenth and twentieth century approximately two million Hungarians have booked a one way ticket for the steamers heading towards the "New World". During the authoritarian regimes of fascism and communism further hundreds of thousands fled from here, for example in the one year period 1956–57 194.000 persons.[1] The gradual loss of population by emigration (3000–6000 persons per year) was not counterbalanced by the numbers of foreigners naturalized, averaging 550 per year for the period 1960–1980, mainly as a result of family unification or final settlement of Greek and Chilean refugees.[2] During this period the number of immigrants did not exceed 1500 yearly.[3]

Hungary which was a typical country of origin during this century has become a significant host country in Europe during the past half decade, as well as an important stepping stone for those heading for the West. Between 1988 and 1992, 90.101 persons have arrived

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1 Detailed statistics for the migration in 1956 are published in: L. RÉDEI, Mária: A nemzetközi népességmozgás negyven éve Magyarországon (Forty years of international igration) in: P. Tamás and A. Inotai (Eds), Új exodus. Budapest, MTA Társadalmi Konfliktusok Kutató Központja és MTA Világgazdasági Kutatóintézete 1993. pp. 188–191.

2 Data calculated on the basis of figures provided by the Ministry for the Interior.

3 Yearly data of immigration requests for the period 1963–1991 are published in: Trends in International Migration, SOPEMI (Continuous Reporting System on Migration) OECD, 1992. p. 154 and in: L. RÉDEI, Mária: A nemzetközi népességmozgás negyven éve Magyarországon (Forty years of international migration) in: T. Pál and A. Inotai (Eds), Új exodus. Budapest, MTA Társadalmi Konfliktusok Kutató Központja és MTA Világgazdasági Kutatóintézete 1993. p. 192.

in Hungary who have stayed longer than one year either as immigrants or as refugees.[4] During the same five years, 118.467 persons have registered with the local offices of the Office for Refugee and Migration Affairs, of whom many remained for less than a year.[5]

A Glance at the Global Processes

A decade ago, in 1983, 68.700 requests for asylum were registered in the most important European countries of destination. This number for 1992 was 686.329.[6] Whereas in 1983, 50–80 percent of the applicants were recognized as refugees, now the recognition rate hardly exceeds 10%.[7] Everything was put into a new light by the tragedy of the dismemberment of Yugoslavia, even if it did not significantly raise the number of political refugees falling under the definition of the Geneva Convention Relating to the Status of Refugees. In Spring 1993 the United Nations High Commissioner for refugees recorded that 600.000 persons fled to territories outside former Yugoslavia to escape the cruelty facing them in Croatia and Bosnia.[8] Besides them there were at least 1.2 million internally displaced persons in Serbia, Croatia, Slovenia and within Bosnia–Herzegovina.[9] Victims of the southern Slav conflict are excluded from the regular procedure on recognition of political refugees and granted temporary protection in most of the host countries. In order to understand better the message of the hard data, it is appropriate to have a brief look at the major turning points of the period following the Second World War.

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4 JUHÁSZ, Judit: International Migration in Hungary Country Report presented to the ECE Workshop on "Causes and consequences of Emigration from Central and Eastern Europe", Geneva, September 13/14, 1993. Table 1. Manuscript.

5 Source: Office for Refugee and Migration Affairs. Treatment of the figures calls for great care, because this figure reflects the cumulated number of those who have contacted the refugee office. The number of recognized refugees in September 1993 was 5.491, of those asylees who enjoyed the support of the Office approximately 8500. (See further information in the main text.)

6 The source of the figures is: 1983: Report of ECRE Biannual General Meeting, Geneva, 1992, Appendix 3 "NOMBRE DE DEMANDEURS D'ASILE PAR AN DANS DIFFERENTS PAYS EUROPEENS" France Terre'd Asile, 1992: UNHCR Statistics on Asylum Applications, UNHCR Regional Office for the European Institutions, Brussels, 1993 May, in: Report of ECRE Biannual General Meeting, Berlin, 1993, Appendix 21.

7 In the first four months of 1993 in Germany 1.7% of the 41.251 led to the recognition of the claims of the applicant. Migration News Sheet, No. 103, June 1993, p. 7 (in 1992 the recognition rate was still 4.25%. See, Report of ECRE Biannual General Meeting Berling, 1993. p. 110).

8 Survey of the Implementation of the Temporary Protection, 30 April, 1993.

9 Numbers on internally displaced persons vary widely. A publication of the UNHCR aggregating the figures for internally displaced, for asylum seekers who had crossed international borders and other protected groups estimated to total at 3.445.000. See UNHCR: Information Note on Former Yugoslavia, No. 5/1993, p. 8. However according to the Office of Displaced Persons and Refugees of the Government of Croatia as of 22 September 1993 numbers are smaller. According to them the total number of registered refugees and displaced persons *in Croatia* is 486.191 to which 36.808 unregistered asylum seekers has to be added. The same source indicates that the number of "refugees from Croatia and Bosnia and Herzegovina located in other countries" amounts to 428.200. Certainly these figures are silent upon the number of displaced persons and refugees in Serbia and within Bosnia–Herzegovina. (Data directly transmitted from the said office.)

The world arena

After the Second World War undoubtedly Europe was the focus of refugee flows. However, since the sixties and seventies many more become uprooted in the developing world than in Europe and more people live in refugee-like situations there, than on our continent.[10] Today out of 18 million refugees,[11] 15 million live outside of Europe,[12] whereas before this time most of the refugees fled from a European country and found protection in the developed world.

European movements

The European refugee movements have undergone two important changes, first at the middle of the decade, the second in the period still running, which began at the turn of the nineties.

The first change was caused by the dramatic increase of the applications submitted by persons fleeing from the developing world. The number of asylum seekers claiming refugee status has risen three to ten times, practically paralyzing the mechanisms of recognition designed for the processing of a couple of hundred files per year.[13]

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10 From the recent literature on this see: LOESCHER, Gil: Refugee Movements and International Security, Adelphi Papers, No. 128, International Institute for Strategic Studies, 1992. London, pp. 11–16.

11 Refugee here refers to recognized refugees as well as other persons in refugee-like situations, who have crossed international borders and are in need of protection. The theme will be elaborated later in this paper.

12 According to the World Refugee Survey, there were 17.556.900 refugees on December 31, 1992. (One year earlier: 16.647.550.) 1.050.000 were in the successor states of the Soviet Union, 1.2 million on the territory of the former Yugoslavia, and 984 thousands in other European countries. See: World Refugee Survey, US Committee for Refugees, 1992. p. 33, Table 1, and 1993. pp. 50–51, Table 1.

13 For the sake of comparison:

Number of new applications in the year (in thousands)

Country	1980	1990
Austria	9.3	22.8
Belgium	2.7	13.0
Denmark	0.2	5.3
France	18.8	54.7
Germany	7.8	193.1
The Netherlands	1.3	21.1
Switzerland	6.1	35.8
United Kingdom	9.9	30.0

Source: People on the move, New migration flows in Europe, Council of Europe, 1992, p. 195 and Trends in International Migration, SOPEMI (Continuous Reporting System on Migration) OECD, 1992, p. 132. Table 3.

The second change is the result of the regime change in Eastern Europe. The flight of masses from the Transylvania part of Romania, into Hungary and the repeated occupation of embassies by large groups of GDR citizens pressing for their evacuation to the West indicating the beginning of the outburst of their "Übersiedlung" has at the same time clearly put an end to the earlier pattern of East–West migration. The historic Autumn of 1989 has brought at least three novelties:

— After a decade of small scale flow of asylum seekers, large masses were once again knocking at Western Europe's door, just as in 1968 and after 1981, partly from states which earlier did not produce significant numbers of refugees (Romania, Yugoslavia, the Baltic states).

— Central European states which used to be countries of origin have become countries of transit or asylum.

— After 1990 the asylum seekers no longer were escaping socialism/communism and its political regime, but they came from more or less democratic states, all subscribing to market economy systems, where either generalized violence, civil war, or the attacks against minorities or the unbearable life conditions forced the people to move.

The large waves coming from the Southern Slav states only could confirm this observation. They also reinforced the need to argument the definition of the 1951 Geneva Convention which had not been intended to cover war-refugees, with a new category and new procedures, relieving the asylum seeker from the complicated individual procedure and assuring at least temporary protection. Indeed, most of the European states have introduced either in law or in practice a provisional status for the Croat and for the Bosnian asylum seekers (primarily for the latter), which guarantees elementary provision for their basic needs and protection against *refoulement*.[14]

Hungary
Brief history

The period between 1945 and 1987, "the past", is uniform: there were no refugee affairs, with the exception of the reception of a few thousand Greek and a few hundred Chilean communists. Accordingly there was no legislation on refugees, except for a single sentence of the Constitution "Everybody who is persecuted for his democratic behaviour, or for his activity to enhance social progress, the liberation of peoples or the protection of peace, may be granted asylum" (Art. 67). It was not supplemented with executive orders, so there were no institutions dealing with refugees. The communist party made the decisions which were executed by the state apparatus on an informal (political) basis.

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14 The practice of 30 states is summarized in: Survey of the Implementation of Temporary Protection (Comprehensive Response to the Humanitarian Crisis in Former Yugoslavia) UNHCR, 30 April 1993.

The "present" started in 1987 with the fleeing of Transylvanian Hungarians, who refused to return to Romania after the expiration of the thirty days of their legal stay. This "present" may be subdivided into two large waves of influx and three phases of legislation.

The first legislative phase lasts till the entry into force of Geneva Convention and other legislative acts, regulating the refugee procedure and status.[15] Before the enactment of the rules on refugees, the Hungarian political leadership has gradually taken over the responsibility from NGOs and religious institutions ever more openly admitting its intentions to support both the Hungarian asylum seekers who had arrived from Romania and the GDR citizens who were looking for an escape route to the West through Hungary. The first sign of these intentions was a Government Decree on the "Settlement Fund" allocating money from the budget for the care of asylum seekers, promulgated on 28 June 1988, which still in a euphemistic way avoided the term "refugee" and spoke of "foreigners staying in Hungary for longer duration".

The second phase of the first wave of influx covered the period October 1989–Summer 1991 till the start of the entry of Southern Slav asylum seekers. In that two years almost exclusively Romanian citizens arrived, frequently illegally crossing the green border. 70–90% of them were ethnic Hungarians who spoke the language of the receiving country, were familiar with its customs, frequently had relatives and family members here. The attitude of the Hungarian Government was also simple: it treated these people as potential immigrants, members of the Hungarian nation who had lived in a minority position in Romania but chose to join the motherland. Therefore, the priority of the authorities was to enhance their speedy integration, not to limit state action to protection and provisional solutions. Asylum seekers were granted residence and work permit without preconditions, could move freely within the country and were relieved from many administrative hurdles in terms of documentary evidence for professional qualifications or formal conditions for taking a bank credit.

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15 The Convention and the Protocol together became Law-Decree No. 15 of 1989 (1989. évi 15. tvr.), see Magyar Közlöny (Official Gazette) 1989 No. 60, p. 1022, entering into force on 15 October, 1989, Hungary became bound by them on 14 March (Protocol) and 12 June (Convention). The Cabinet-Decree (101/1989. Mt. rend.) on the procedure was published in Magyar Közlöny (Official Gazette) 1989 No. 66, p. 1090. An unofficial and inaccurate translation of it can be read in Report of ECRE Biannual General Meeting, Budapest, 1991, Appendix 14, which reproduces the Council of Europe, European Committee on Migration document (CDMG) "Information on the main features of the situation with regard to refugees in Hungary" The Law-Decree on the status of refugees (1989. évi 19. tvr.), see Magyar Közlöny 1989 No. 66, p. 1090–just like the Cabinet-Decree on the recognition procedure has entered into force on 15 October 1989. The Law No. XXXI of 1989, radically reshaping the Constitution and enacting the new rules on asylum was promulgated on 23 October 1989. (Magyar Közlöny, 1989. No. 74. p. 1244.) An unofficial translation incorporating later modifications was published in a trilingual law publication called Hatályos magyar jogszabályok, Geltende Ungarische Rechtsnormen, Hungarian Rules of Law in Force, vol. I/1990/No. 16, p. 1625.

Table 1
The number of asylum seekers in the first wave of influx

		until the end of 1988	1989	1990	1991, until June 1, 1991	total until June 1, 1991
Total		13.173	17.448	18.283	2.629	51.533
	From Romania	13.098	17.171	17.416	2.103	49.788
Formally recognized as refugee		0	185	2.561	149	2.895

Source: Authors calculations based on data of the Office of Refugee and Migration Affairs[16]

The second wave lasting from Summer 1991 is characterized by a totally different composition of asylum seekers. The number of arrivals increased radically. Whereas until 1 June, merely 2629 persons have come, of whom 80% were Romanian citizens almost exclusively of Hungarian origin and further 16% Soviet citizens, after the outbreak of war in Croatia only between 1 June and 30 September, an estimated 35.000 persons fled to Hungary, mainly Croats (67.7% of the registered asylum seekers). By the end of the year, the proportion of Yugoslav citizens among the total of 54.693 asylum seekers has reached 87% and that of Romanian citizens dropped to 10%. In 1992, 92.7% of the 16.204 asylum seekers came from Yugoslavia, 5.2% from Romania, 1.5% from the former Soviet Union and 0.6% from other countries.[17] The arrival of Croats, Serbs, Bosnian Muslims, Albanians and Russians meant that for the first time the state organs were confronted with a real refugee flow, calling for rapid reactions and brave emergency solutions. They had to deal with asylum seekers who came from genuine nightmares, often only hours before meeting the Hungarian authorities. All in all the support system functioned quite well and many civil servants of the Office of

16 Unfortunately there is a lack of consistency in the data provided by the Office of Refugee an Migration Affairs. Figures for the same period may differ in subsequent communications. Even interviews with the person compiling the statistics could not entirely clear the puzzles.

17 All the data in this paragraph stem from mimeographed fact sheets of the Office of Refugee and Migration Affairs.

Refugee and Migration Affairs proved to be ingenious in solving absolutely acute problems which they had never experienced during the far more balanced previous phases. Contrary to the ethnic Hungarians who had come from Romania with the view of settling here, the refugees from Croatia and Bosnia did not intend to integrate, but were and still are awaiting the end of hostilities when they can voluntarily return. This was even reflected in the fact that they were unwilling to leave the close vicinity of the Southern border of Hungary (facing Croatia and Serbia) and move into the middle or Northern part of the country. The only alternative to voluntary return in their eyes is resettlement in the West.

As the worst moved down to Bosnia and the situation in Croatia became stabilized, the stream of asylum seekers has slowed down and a transformation in the composition can be observed. Of the 3.256 persons entering Hungary in the first seven months of 1993 with the aim of receiving protection and some sort of status, 2.224 were ethnic Hungarians. This might signal the beginning of a fourth phase, in which internal tensions within Serbia—especially in the region where most of the 450.000 ethnic Hungarians live, Vojvodina—may force people to escape individualized persecution committed or tolerated by the state authorities, as was the case in Romania not so long ago. The following table summarizes the most important data:

Table 2

The number of asylum seekers in the second wave

		Junel, 1991 December 31, 1991	1992	1993 till 1 September	total
Total		52.064	16.204	3.596	71.864
	From (former) Yugoslavia	approx 48.000	15.012	3.053	approx. 66. 000
	From Romania	1.791	844	401	3.036
Formally recognized as refugee		285	472	186	943

Source: Data of the Office of Refugee and Migration Affairs The situation in September, 1993

Many members of the first asylum seeker wave have in the meantime regularized their status. An indication for that is that the number of naturalization requests have gone up sharply. In 1989, 2.800, in 1990, 9.500, in 1991, 13.400, in 1992, 15.000 and during the first half of 1993, 11.400 applications for naturalization were filed, which means that around 120.000 persons are awaiting naturalization, because each application concerns a whole family. Until September 1993, approximately 45.000 persons were naturalized as a consequence of these requests, in about one thousands cases Hungarian citizenship was denied, the remaining cases are still pending.[18]

More than 10.000 persons have chosen to apply for immigrant (permanently resident alien) status who afterwards still have to option to become naturalized. Therefore the majority of the asylum seekers who have come from Romania have drifted into another status including several thousands successfully resettled in the West and other hundreds who voluntarily returned. The total lack of continuous record of former asylum–seekers makes it impossible to produce precise statistics.[19] In April–May, 1993 the authorities have decided to re-register the asylum seekers, who still enjoyed refuge in Hungary whether in reception centers and temporary shelters or at families or on their own, to answer challenges heard from different circles concerning the actual number of persons supported. The result of this process has revealed that indeed an impressive share of the new arrivals, who appeared in the statistics has in the meantime disappeared from the view of the authorities, including local governments which distributed aid to privately hosted asylum seekers. The result of the registration may be summarized as follows:

Table 3

Asylum seekers registered as receiving support from Hungarian state organs in September 1993

Category	Number of persons
Asylum seekers living in permanent reception centers or temporary shelters run by the Office	3.327
Asylum seekers receiving support from the municipal authorities, but hosted by families or living on their own account	4.581

Source: Office for Refugee and Migration Affairs

18 Data provided on the author's request by the Department on Nationality of the Ministry of the Interior.

19 Since figures on natiuralization and immigration include "normal" cases and asylum seekers one cannot simply deduce from the number of asylum seekers from Romania the naturalized or immigrated Romanian citizens. (As a matter of fact even statistics enabling this simple calculations are not available.)

At this point it is important to note that there are approximately 10–15.000 persons enjoying refuge in Hungary without ever receiving formal support as asylum seekers. Draft evaders and others with strong family links frequently prefer to remain anonymous, and stay in Hungary within the bounds of normal aliens law, eventually letting the alien's police know about their particular motives, which may lead to a more liberal treatment in granting stay or residence rights.

Legal Status of Asylum Seekers in Hungary

Refugees

The Hungarian Constitution includes rules which are almost identical with the Geneva Convention's definition.[20]

Section 65

> "(1) The Republic of Hungary—in accordance with the provisions of law—grants asylum for those foreign nationals, who in their country of nationality, or for those stateless persons who in their residence are persecuted for racial, religious, national, linguistic or political reasons.
> (2) A person granted asylum cannot be extradited to another state.
> (3) The adoption of the law on asylum requires the votes of the two thirds of the Members of Parliament who are present."

Since October 1989, when the possibility to apply for refugee status was opened up approximately seven thousand applications were filed, and 5.491 persons were recognized as Convention refugees.[21] Roughly 80% of them were Romanian, 10% Yugoslav citizens, including Yugoslavia's successor states, and the last ten percent is divided between Russian, Ukrainian, Lithuanian citizens, and persons from the Balkan region. The majority of those who came from Romania and the Yugoslav successor states declared herself/himself Hungarian. None of the recognized refugees came from the developing world, which is explained by the fact that Hungary acceded to the Geneva Convention with the geographic reservation, which meant, that victims of persecution outside of Europe were excluded from the implementation of the Convention by the Hungarian authorities. Therefore those who fled unbearable fate in Iraq, Iran, China, Afghanistan, Sri Lanka and other countries still practising political persecution and came to Hungary or were stranded here on their way to another destination, only have one hope: if the Budapest representative of the UNHCR Recognizes their claim

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20 A more detailed description of the legal framework highlighting the slight differences between the Constitution and the Convention is to be found in NAGY, Boldizsár: The Hungarian Refugee Law (in: H. Adalman—E. Sik—G. Tessényi (eds.), Refugees in Hungary, York Lanes Publishers, Toronto, 1993, in print).

21 Data provided by the Office of Refugee and Migration Affairs on 30 September 1993.

to refugee status and UN protection, their presence will be tolerated upon the basis of a gentleman's agreement between the representative and the Hungarian alien's police.[22]

Asyless

This term is used to describe the more than hundred and ten thousand asylum seekers, constituting more than 95% of all arrivals, who did not become Convention refugees in Hungary. Since they are not refugees in the narrow sense of the word, they do not come under the personal scope of the—otherwise generous—refugee legislation, granting Convention refugees national treatment with the exception of the right to vote or to take a job requiring Hungarian citizenship.[23] What is their position, what are they entitled to, could we ask. Surprisingly until Spring 1993 this term did not show up in any Hungarian legislation.[24] Written law is fairly sparse, enumerating certain expenses (elementary and secondary schooling, health care, social services, supply in the reception centers, including meals, language education) which can be covered by the Fund. In practice about 16 thousand Southern Slav asylees have spent briefer or longer periods in the permanent reception centers (Bicske, Békéscsaba, Hajdúszoboszló) or in the temporary shelters (Lakitelek, Máriagyüd, Mohács, Nagyatád, Pécs, Szigetvár and others). As of 1 September 1993, 2954 persons were taken care of in those camps. The others were either hosted by Hungarian families—in some villages the asylum seekers in 1991 outnumbered the local population—or had the means to support themselves in bread and breakfast rooms or modest pensions. Few hundred asylees found shelter in establishments run by the Hungarian Red Cross in Csillebérc[25] or in Nagyharsány, maintained by the Hungarian Interchurch Aid.

Practically also those who came from Romania were asylees, since out of the approximately fifty thousand only about four thousand have become Convention

22 The existence of this gentleman's agreement was not only confirmed by conversations of this author with relevant actors, but also by the former deputy head of the Office for Refugees, see: Dr. TÓTH, Judit: Ungarn, National Report, in: Asyl- und Einwanderungsrecht in europäischen Vergleich (Schriftenreihe der Europäischen Rechtsakademie, Trier, Band 1) ed.: HAILBRONNER, Kay 1992, p. 88. Between 1989 and 31 July 1992 16 Somalis, 4 Ethiopians, 3 Iraqis, 3 Sri Lankans, 2 Iranians, 1 Chinese and 1 Egyptian person has received the five line long certificate confirming that "on the basis of available information [that person] is considered to be a refugee within the mandate of the Office of The United Nations High Commissioner for Refugees". The total number of recognized persons till September 1993 was 47 out of 1313 who have approached the Budapest Office.

23 See the Law-decree No. 19 of 1989 which also exempts refugees from military service, guarantees free language education and accelerated naturalization if they apply.

24 Only the Law No. XXVI on the Fund for the Support of Refugees replacing the Settlement Fund of 1988 introduced the term "persons enjoying temporary portection on the territory of Hungary" which amounts to asylees. Art 3 (2) c).

25 According to data, provided by the Hungarian Red Cross 250 persons have arrived to the Csillebérc camp, and 183 have left during 1992. 40% of them stayed less than a month and the majority of those who left managed to travel to third countries with the help of the Red Cross. It is important to note that Csillebérc is one of those shelters where non-Europeans get assistance as well.

refugees. The others might have lived for a while in the reception centers, they also may have received financial assistance from the Settlement Fund, but most of them have already integrated into the Hungarian society. Relatives, friends, the impressively active Hungarian churches and NGOs were instrumental in paving this way.

Problems awaiting solution
Legislative issues
The missing code

The present government has been unable to submit to Parliament the comprehensive bill on the status of refugees and the procedure leading to it which had been promised by the predecessor government already at the adoption of the presently effective regulation. The urgency of the problems in 1989 has justified that neither the rules concerning the rights of recognized refugees, nor the procedure of recognition was regulated in an Act adopted by Parliament, but in a Law-decree adopted by the 17-member Presidential Council, and in a government decree. It was understood that those rules were only to guide action for a brief period until the requirement of the Constitution that individual rights must be regulated by Acts of the Parliament would be met. Conceptual drafts of the bill have circulated in ministerial offices but a coherent final text of the bill does not yet exist in September 1993.

Unification of terminology

The new Act on the Refugee Support Fund[26] adopted on 9 March 1993 has only increased the confusion already prevailing in the written law. Before its enactment the cavalcade of denominations included "refugee", applicant for refugee status" "applicant for territorial asylum", "applicant for refuge" and person enjoying ("territorial asylum" The Act on the Refugee Support Fund has introduced two new categories: "persons enjoying temporary protection" and "persons who were granted leave to enter for humanitarian grounds". [Art. 3 (c) and (d) of the Act.] This is an unwelcome innovation in this form, since no one knows whether rules embodied in earlier legislation including the constitution itself which do not use these terms but refer only to refugees or persons enjoying asylum would also cover the new categories, the asylees. To give but one example: the absolutely fresh Act on Entry, Sojourn and Immigration of Foreigners adopted by Parliament on 14 September 1993 makes it clear that its—fairly strict—rules do not apply to "aliens recognized by the Hungarian authorities as refugees, and to asylum-applicants until their case is decided". [Art. 2 (3).] Does that mean that persons enjoying temporary protection are subject to the fairly demanding requirements which ordinary aliens have to meet for the grant of a residence permit? (At present nobody would think so. But if harder times come with large influxes of non-Convention

26 1993. évi XXV. tv. Act on the Fund for Refuges.

refugees, this law may be used as a tool to keep them at bay, which would certainly be a disfunction of the innovative mood of the law-maker.) The only way out of this could be if the asylee status was codified with a clause expressing the legislators intention concerning the interpretation of terms included in earlier acts and decrees.

An asylee status comprising temporary protected groups and individuals accepted on lesser than Convention grounds be established and defined

Clear rules must be formulated guaranteeing the protection of victims of civil wars and other man-made catastrophes. They should enjoy a certain measure of tolerance and protection. They should be exempted from the usual requirements that foreigners are supposed to meet if they want to stay or reside in Hungary. An asylee status, something similar to the temporary protected status established by US legislation[27] should be introduced which would unambiguously determine whether the temporary protected person had a right to work, or to set up business venture to what level of state assistance (s)he is entitled, whether (s)he was allowed to return briefly to her/his home country to check if the house was still not destroyed, family members still alive. The situation giving rise to claims for temporary protection would be designated by an appropriate body, which should be appointed after political discussions. The determination would extend this form of protection to a whole group or class of persons and it would explicitly have temporary character, not—or at least not necessarily—giving ground to claims for further presence, immigration or naturalization.

The second "asylee" situation to be regulated would refer to cases where an individual for one or more reasons does not meet the criteria of the 1951 Convention but for humanitarian reasons, to be determined on a case by case basis, would be allowed to remain in Hungary for a reasonably long, or an unlimited period. Such an individual should not only be exempted from the normal requirements of immigration but should also enjoy full protection from the persecuting state and against refoulement: moreover he would enjoy part of the benefits offered to Convention refugees. Decision is needed to regulate their position if grounds for flight cease to exist. It is crucial that procedural rules on the—individual or group—recognition of asylees be elaborated.

Withdrawal of the geographic limitation

The government's several times repeated promise on the withdrawal of the geographic reservation must be realized. None of the neighbouring countries has made such a reservation, even though their economic situation is by no means better than ours. A further fact calling for the withdrawal of the reservation is that Art. 65 of the Constitution on asylum does not contain any reference to geographic scope, but clearly

27 See Section 302 of the Immigration Act of 1990 which became Section 244A of the Immigration and Nationality Act of 1952. 8 USC 1254A.

declares that Hungary grants asylum to the persecuted. One may add that the customary rule of non-refoulement is binding Hungary without the need for a treaty-law confirmation. As a result of this, Hungary is not entitled to return persons to non-European areas if their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion, or if they had to face torture or inhuman or degrading treatment or punishment.[28] This means that a person from the developing world already now has a right to stay in Hungary if no safe third country is obliged to let that person enter.

Guarantees affecting the procedure have to be strengthened

Today applicants normally do not have legal assistance. They have to recount traumas which are psychologically extremely painful to recall, often with the help of untrained translators, frequently fellow asylum seekers. Circumstances of the hearing hardly alleviate the mistrust, asylum seekers normally feel towards authorities, whom they are used not to rely upon. Anxiety for those who remained at home may also induce the applicant to "correct" the story which undermines credibility in the eyes of the authorities, even if was justified by that concern. Many phases of the procedure are only regulated by established practice, without the sanction of law. Presently the border guard himself decides whether to return to Serbia a bus packed with exhausted Bosnian refugees, insisting that (small) Yugoslavia is a safe country where they could have found protection. These practices have to be reviewed and regulated by written rules setting standards against which the act of the individual official may be judged.

The practice of preliminary screening

One may wonder what happens to those "newcomers" who appear at the input side of the statistics but disappear before the numbers concerning formal recognition procedure starts. To take a non-exceptional year, preceding the flight from Yugoslavia, in 1990 18.283 asylum seekers were registered but only 3.513 procedures for recognition were started. What happened to 4/5 of the asylum seekers, to almost 15.000 persons? In their case a sort of "eligibility" procedure or preliminary screening has shown that their claim is manifestly unfounded. The person conducting the first personal hearing of the asylum seeker relied upon his personal experience and feeling in deciding whether to screen out that person, for "obviously unfounded claim" or whether to enter him in the register of

28 1984 UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment expressly prohibiting refoulement or extradition of a person "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture" became part of Hungarian law in 1988 as Law-decree No. 3 of 1988. Hungary is also bound by the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols which she signed in 1990 November 6.

applicants, thereby setting into motion the formal procedure safeguarded by the possibility of administrative and judicial review.

In these "eligibility procedures" two different groups are involved.

The first comprises aliens, who because of the lack of information simply did not precisely know how to achieve their goal of remaining in Hungary. They might have approached the organs of the Office of Refugee and Migration Affairs with a vague idea of their possibilities for remaining in Hungary and after receiving advice might have entered the normal route of aliens desiring residence. No serious reservations should concern these cases since the persons concerned voluntarily observe the advise of the contacted organ.

The other group is composed of cases in which the asylum seeker is prevented from starting the procedure against his will. The authority may find that his application is simply repeating an earlier one and deny its processing or it may declare that it is manifestly unfounded or late in time. The effort to start a procedure unfounded or late in time. The effort to start a procedure may fail right at the outset when the alien does not succeed in convincing the border guard that as an asylum seeker he or she is entitled to enter Hungarian territory and submit a formal application.

In both cases no formal—and therefore appealable—decision is taken, everything happens in an informal, non-written way which by definition raises doubts. Only the adoption of public regulation raises doubts. Only the adoption of public regulation of this preliminary screening procedure could clear this anxiety.

Information

Staff of the Office for Refugee and Migration and of the local offices repeatedly complain about the lack of firm information on which to base their decision. It is rarely possible to verify by external means whether the fear of persecution is well founded. Therefore the credibility—or alleged non-credibility—of the applicant becomes paramount. There are hardly any data banks and other sources of information within reach of the acting authorities to confirm or defy statements of the applicant. If asylum seekers come in great numbers from well-defined areas of neighbouring countries this problem can be overcome by comparing reports and statements of the asylum seekers who frequently described the same events in terms allowing cross checking.[29] But in the case of asylum seekers coming from remote areas of the world—especially after the lifting of the geographic reservation—the authorities entrusted with the responsibility to decide will have to multiply their efforts in order to get access to information generated and

29 According to recollections shared by officials active in local authorities in cases when Hungarians were persecuted in Romania in spring 1990, then after the first person's account of the events taking place in a village or similarly well defined location (pogroms, whatever) they could expect that further persons affected by the persecution would show up and frequently those persons indeed appeared within a matter of days.

transmitted by impartial actors. This task is already existing, even if the geographic limitation is in force, because the *non-refoulement* principle binds Hungary in relation to forced migrants, wherever they may have come from.

Another aspect of the information issue is the total lack of transparency with regard the activity of the Office. No decisions are published, not even the courts's judgements in the five cases decided at court level so far. The public has no access to the reasoning of these decisions, so it cannot assess whether the conspicuous inclination to confirm the decision of the first instance after appeal still within the administrative procedure (in less than 1% of all the cases did the appeal organ, the Office of Refugee and Migration Affairs reverse the negative decision of its own local authority passing the first decision) is the sign of the extreme well-foundedness of the first decision, or of something else.

The challenge of asylum seekers (forcibly) returned or expelled from Western European states

In 1993 more and more Bosnians and ethnic Hungarians from Voivodina and Romania were called upon in Western Europe to voluntarily return or were deported back, frequently with the formal justification that Hungary was the country of first asylum. In order to avoid producing refugees in orbit the Hungarian law must incorporate guidance for this—ever more frequent—situation.

Practical issues

The refugee identity card issued to the persecuted and the residence permit handed over to the asylee only ladles a spoonful out of the see of troubles surrounding an asylum seeker. In order to live a worthwhile human life (s)he has to find a durable solution. If there is no third state offering resettlement—the dominant condition of the asylum seekers today in Hungary—then the Hungarian society has to advance those structures and mechanisms which are requisite either for the integration of the refugees and asylees, or for the endurance of long years of temporariness. Basic schooling, health-care and social security are not enough. It is of paramount importance that also asylees not only recognized refugees be freed from the closed circle of subsidies. They must regain their self-assurance by taking wage earning jobs or setting up their own businesses. No effort may be spared from reuniting divided families. A more reasonable use of the Refugee Support Fund should enhance their access to normal housing conditions. Domestic population must be informed that a few ten thousands of (or even less) asylum seekers (75% of them elderly, minor and women) do not appreciably increase the tension of the labour market with already 700.000 unemployed. In order to check xenophobia, a consequent campaign must be carried out highlighting the difference between asylum seekers and illegal migrants, it must be emphasized that being one of the 45 most developed nations in the

world[30] it is Hungary's moral and legal duty to assist the victims of persecution and other disasters, whereas the state is indeed entitled to fight and does fight against illegal migrants with all the tools approved under the rule of law and in conformity with international legal obligations.

What is ahead?

Future does not derive from the past, even it cannot arrive without it. What should we prepare for, then?

Ever more people will come from the developing world. The South–North pressure is increasing for demographic and economic reasons. In the coming twenty years 730 million new job seekers will appear on the labour market and—upon failure to find employment—consider moving to the developed world (where at present there are 586 million jobs altogether!).[31] Western Europe is rushing to close all legal gates leading to the long term residence of non EC national aliens (with the exception of the EFTA countries). Conditions for acquiring refugee status are tightened in several states.

New, restrictive national laws

As of 1 July 1993 Germany has modified its generous Art. 16 of the Grundgesetz, which served as a compensation for the persecution committed by the Third Reich, and granted asylum for all politically persecuted. In Austria a new law on asylum entered into force on 1 June 1992 significantly narrowing the possibilities of asylum seekers, introducing clauses which exclude investigation of the substance of applications if the concerned person has come from a safe country, and also if the application is obviously unfounded according to the judgement of the authorities. Simultaneously the physical control of borders with Hungary, the Czech and Slovak Republic has been reinforced. New, stricter Asylum Law was adopted in Britain in Summer 1993 and the enactment of the new French legislation was only delayed because of the intensive public protest against its discriminatory features.[32]

Steps taken by member states of the EC

The European Communities is also adopting a policy of establishing administrative and legal techniques to circumvent the spirit of the Geneva Convention. National refugee

30 World Resources 1992–1993, A Report of the World Resources Institute in collaboration with The United Nations Environment Programme and The United Nations Development Programme, Oxford University Press, New York, Oxford, 1992. Table 15.1, pp. 236–237.

31 Speech of James N. Purcell, Director General of IOM at the 1993 April meeting of the human dimension of the CSCE.

32 Migration News Sheet, No. 123/93. p. 3.

officials tend to complain about the large number of "manifestly unfounded claims" which only deserve an accelerated and simplified processing, if at all. In 1990 the twelve EC members have adopted the Dublin Convention outside the legislative mechanism of the EC to identify one single state responsible for the investigation of an application for asylum status, with the effect of a binding decision on the other eleven.[33] The same purpose motivated relevant parts of the Schengen agreements of 1985/1990.[34] Although at present none of these agreements is formally in force, they deeply influence the practice of Western European states. In order to avoid the substantive evaluation of the asylum seeker's application they endorse several concepts not to be found in the Geneva Convention.[35] Resolutions of the Ministers of the Member States of the European Communities responsible for immigration, adopted at their meeting in London, on 30 November to 1 December and confirmed by the European Council in Edinburgh, 12 December, 1992, legitimize the use of categories such as "manifestly unfounded claim", "deliberate deception or abuse of asylum procedures", "host third country". For "manifestly unfounded claims" accelerated procedure is foreseen which "need not include full examination at every level of the procedure those applications which fall within the terms of paragraph 1". That paragraph identifies three kinds of manifestly unfounded claims: where there is no substance to the claim, where the claim is based on deliberate deception or is an abuse of asylum procedures, finally when the application falls within the provision of the other resolution of the ministers on host third countries. If the asylum seeker comes from a country which appears on a list of countries in which "there is in general terms no serious risk of persecution", that may be enough to limit her/his chances by presuming that there is no substance to the claim, therefore it is manifestly unfounded, include the frequent situation that the applicant destroyed her/his passport, or produced an application, which was inconsistent or contradictory or even if protection was available for the individual in "another part of his own country to which it would be reasonable to expect him to go".

The "Resolution on a harmonized approach to questions concerning host third countries" plainly tells that "[t]he principle of host third country is to be applied to all applicants for asylum, irrespective of whether or not they may be regarded as refugees". In order to qualify as a host third country, modest requirements are to be met. The life and freedom of the asylum applicant must not be threatened, (s)he must not be exposed to torture or inhuman or degrading treatment, and must be afforded effective protection

33 See: International Journal of Refugee Law, vol. 2 (1990) No. 3. p 469.

34 The Schengen Agreement and the Schengen Implementation Agreement were concluded by France, Germany and the Benelux countries, see ILM, vol. 30 (1991) p. 68. Italy, Greece, Portugal and Spain adhered later. They include provisions on control at outer frontiers, a common visa policy, carrier's sanctions, responsibility for dealing with requests for asylum and establish the Schengen Information System.

35 From the most recent literature see: HAILBRONNER, Kay: The Concept of "Safe Country" and Expeditious Asylum Procedures—A Western European Perspective and ARBOLEDA, Eduardo—HOY, Ian: The Convention Refugee Definition in the West: A Legal Fiction, International Journal of Refugee Law, vol. 5 (1993) No. 1. pp. 31–65, and pp. 66–90.

against refoulement. If these conditions apply and the person at least "has had an opportunity at he border or within the territory of the third country to make contact with that country's authorities in order to seek their protection" then the case will not be examined on the merits. This meant that a Bosnian refugee, who transited Bulgaria (not a party to the Geneva Convention relating to the Status of Refugees) has nevertheless been in a host third country and can be sent back after the accelerated procedure or even returned at the border, without any procedure at all.

This purpose is reinforced by the spreading grid of readmission agreements entitling the more affluent Western states to return persons to countries which they have travelled through, with the obligation of the latter to readmit them to their territory.[36]

Hungary's choice

So far Hungary has achieved international respect with its generous, humane policy towards asylum seekers, including times of large scale influxes. Nevertheless now it seems to face a hard political and moral choice. Either it will harmonize its legislation and administrative practice with the restrictive European powers hoping that joint efforts with them will help to obey obligations of refugee law and resist undesired irregular migration, or, remembering the specific features of the Central and East European fate, it will try to cooperate with countries of this region facing similar challenges.[37] That could lead to common leverage on the wealthy states to share the burden and responsibility of finding a middle ground between restrictions and economically not viable openness. Such a balanced policy would make the border guards and refugee officials identify the same fear and hope in the eyes of the Iraqi or Moroccan asylum seeker what their Canadian or Austrian counterparts could see in the look of our—similarly poor and underqualified—predecessors in 1957.

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36 The Benelux states, Germany and France have concluded an agreement to this effect with Poland on 21 March 1991, published in: Asyl- und Einwanderungsrecht in Euopäischen Vergleich (Schriftenreihe der Europäischen Rechtsakademie, Trier, Band 1) ed.: Kay Hailbronner, 1992. pp. 208–213. Which was followed by another bilateral agreement between Germany and Poland on 7 May 1993 assuring Poland financial assistance in the magnitude of 120 million DM. Germany is trying to conclude similar agreement with the Czech Republic, and has already signed one with Romania. Austria and Hungary have also signed a return agreement on 9 October 1992, Hungary also has return agreements with Romania (signed 1 September, 1992) and with Slovenia (signed 20 October, 1992). None of the Hungarian agreements has been made public nor entered into force yet.

37 Interior ministers of Austria, the Czech Republic, Hungary, Poland, Slovakia and Slovenia have adopted a Final Communiquè at their negotiations in Prague, 16 April 1993, reflecting their agreement to propose their governments cooperation concerning five issues: denial responsibility for "old cases" of foreigners whom the FRG intends to return as a consequence of the new asylum law; allowing transit for returned persons, making efforts "towards completing mutual standardized readmission agreements in their countries and will initiate the conclusion of such agreements with countries producing illegal migration"; harmonization of asylum procedures and finally use of possibilities provided by the CSCE to tackle the "serious security problem" of the issue of European migration.

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Regional Economic Integration and the Multilateral Trading System: What Role for the GATT?

1. The Phenomenon of Regional Economic Integration

Definition of terms is an essential preliminary to any scientific study. I have found the following definition by a British economist, Dr. Ali El-Agraa, a specialist in the analysis and critique of international economic integration, to be clear and helpful:

> "international economic integration is ... a *state of affairs* or a *process* which involves the amalgamation of separate economies into larger regions". [My emphases.]

The same scholar elaborated, as follows:

> "More specifically, [it] is concerned with the *discriminatory removal* of *all* trade impediments *between the participating nations* and with the establishment of certain elements of cooperation and coordination between them". [My emphases.] (El-Agraa, 1988)

Article XXIV of the GATT (extracts from text are annexed) defines customs unions and free trade areas (FTAs) for purposes of qualifying for the exception to the basic most-favoured-nation (MFN) rule that Article XXIV provides. Summarising Article XXIV, para. 8, a free trade area is an association ("group") of two or more countries ("customs territories") with duty free treatment of imports from other group members, together with removal of other trade restrictions, particularly quantitative restrictions, *inter se.*

A customs union is an association of countries with duty free treatment of imports from members, plus removal of other trade restrictions *inter se,* plus, crucially, a common external tariff for imports from non-members. Article XXIV also contemplates an

"interim agreement" leading to a FTA or customs union within a "reasonable period of time" [para. 5 (c)].

The now distant decade of the 1960s has been termed the decade of integration [Haberler in *American Econ. Rev.* (1964)], but the trend has not slackened. A recent list compiled by the GATT Secretariat showed that almost 80 preferential trade arrangements (most of them regional) had been notified to the GATT, under Article XXIV, or had GATT implications. In 1992 the GATT Council was notified of *sixteen* regional integration initiatives. The then Chairman of the Contracting Parties, Ambassador Anell of Sweden, declared that "much time will be devoted in the coming years to working party examinations of these arrangements". (Address to Annual Session, 2 Dec. 1992, *GATT Press Communique.*) He suggested the time was now ripe for a review of the way in which the working parties well fulfill their remits under Article XXIV, in particular, to ensure that they produced "clear and meaningful results". Later in this paper, I shall refer to recent proposals for reform of Article XXIV and procedures for its application.

By the mid-1990s membership of the GATT was approaching universality, and very few of the Contracting Parties are not also parties to a regional FTA or an actual or potential customs union. Such arrangements exist in all continents and involve all the major market economy and industrialised nations except Japan; many developing countries, and (in ASEAN) some of the New Industrializing Countries (NICs). China and India are not parties to regional arrangements; Pakistan is a member of a loose cooperation agreement with Iran and Turkey; South Africa is also an "outsider", as are Russia and the other republics of the former USSR. But these are exceptions. [The next paper in this session deals with the Association Agreements between the EC and Central and East European States—an incipient form of regional economic cooperation.]

2. *Reasons for Forming Regional Trade Arrangements*

From now on in this paper, I shall use the looser, non-technical term "regional trade arrangements" (RTAs).

Many RTAs were proposed for *political* reasons, even though these may have been undeclared, and covered by arguments that the proposal would bring economic advantages.

Among the *main economic advantages* which are possible in theory and which have been realised in varying degrees by certain of the established RTAs, including the EEC an EFTA, are the following:

more efficient production following increased specialisation (the economic law of comparative advantage);

increased production levels from economies of scale made possible by the larger market;

improved international bargaining strength bringing better terms of trade;

more efficient use of resources through increased competition.

If member countries proceed beyond formation of a customs union to closer economic integration (a common market—customs union with free factor mobility across members' frontiers; or an economic and monetary union) further gains become possible from

— factor mobility—free movement of goods, labour, investment capital, establishment of companies and firms, provision and receipt of services;

— coordination of monetary and fiscal policies.

Other motives which can lead States to form RTAs:

(i) to find relief from the use of allegedly "unfair" trade rules, e.g. imposition of anti-dumping or countervailing duties on their exports. This seems to have been one reason for Canada and Mexico seeking to form FTA with the United States.

(ii) dissatisfaction with the GATT, particularly since the growth in membership which results in perceived slowness of negotiating tariff reductions and the control or elimination of non-tariff barriers.

(iii) to create a regional arrangement within which the member States can regulate matters which they consider need some control but which, currently, are outside GATT rules, e.g. trade in services; intellectual property rights; competition policy; environmental concerns.

(iv) to create an arrangement of trading partner countries within which there can be more effective dispute settlement procedures (quicker, more likely to lead to binding determinations which are then implemented) than are currently available in the GATT system. This motive was clearly present for the US and Canada in negotiating their FTA which entered into force in 1989. Many members of the GATT Working Party examining this Agreement were concerned at the implications for the GATT dispute settlement system of the dispute settlement provisions in this FTA, particularly as regards their possible impact on the GATT interests of third parties. (BISD 38th Supp. 47 at 54–55, 75.)

3.1. GATT Law—MFN Principle and Article XXIV

Since 1950 economists have pointed out that formation of a customs union or FTA can have harmful effects for non-members. The arrangement is inherently *protective* vis-à-vis third parties in that the move to free trade among the members is combined with retention or even increase in impediments to trade against non-members. In other words, the members create *discriminatory* trade liberalisation. The GATT was founded upon the principle of *non-discriminatory liberalisation.* To quote from a US government study:

"The unconditional most-favoured-nation (MFN) provision is the cornerstone of the international trade rules embodied in the GATT".

[Exec. Branch GATT Studies No. 9. The MFN Provision, at 133. Quoted in Jackson & Davey (1986) 428.]

The same study observed that this principle ensures that each country will satisfy its import needs from the most efficient sources of supply, allowing the operation of comparative advantage.

Article XXIV of the GATT enshrines on of several *exceptions* to the basic MFN provision. Some authorities regard it as the most important exception (Jackson & Davey, 430). Article XXIV permits States which are GATT Contracting Parties to form RTAs provided that the arrangements satisfy *certain conditions,* namely, that they *do not create higher levels of discrimination* against non-members than existed when the RTA was formed, and that tariff and other trade restrictions are removed on *substantially all the trade* among the RTA members.

Why did the GATT founders allow this exception to the principle of non-discrimination?

1) Historical precedents—exceptions to MFN obligations for border trade and limited regional arrangements were traditional [see Article XXIV, para. 3 (a), frontier traffic].

2) They considered that regional FTAs or customs unions would be a step towards *general* trade liberalisation. The benefits resulting from free trade in one area should increase productivity and wealth, so that even more goods would be imported from non-members.

3) They realised that they could not prevent States from entering into RTAs and to have attempted to deny States this right "particularly when the main driving force may be political rather than economic, would have been a major setback for the world community". (El-Agraa, p. 4.)

3.2. Article XXIV in Practice. Problems of Interpretation and Application

As noted, there are two main conditions attached to Article XXIV exception to the non-discrimination principle.

I (in para. 5) that the customs tariffs of the FTA or customs union applicable to trade with GATT parties which are not parties to the FTA or the union "shall not on the whole be higher or more restrictive " than "the general incidence" of such tariffs applied prior to the formation of the FTA or customs union.

II (in para. 8) that the arrangement must cover "substantially all the trade" between the parties to the FTA or customs union.

Condition I. Customs tariffs to be "not on the whole higher".

If the adoption of a Common External Tariff by members of a customs union results in the raising of some member States' tariffs above the level at which those duties were "bound" under GATT Article II,[1] affected non-members have a right to renegotiate those bound tariffs, under the procedure of Article XXVIII, to arrive at "compensatory adjustment" (Article XXIV:6). These negotiations have been difficult and have led to some protracted disputes (the "Chicken War" between the US and the EEC in 1963; disputes over US rights to export grains to the EEC). One example must suffice:

1 A tariff is "bound" when a State has filed with the GATT a commitment either not to increase an existing rate, or to lower it. Commitments are included in a tariff schedule.

When the EEC was enlarged by the admission of Denmark, Ireland and the United Kingdom in January 1973, a series of GATT bindings that had been in effect for those three States were withdrawn. In Article XXIV:6 negotiations the EEC argued that the tariff *reductions* which the three countries were implementing as part of the EEC's Common External Tariff *outweighed* the tariff increases on other products which they were having to impose on joining the EEC. Reduced tariffs on industrial goods were sufficient to offset loss of lower duty rates on agricultural products. The US disagreed and sought compensation for this increase in tariff rates affecting their exports to Denmark, Ireland and the UK. The dispute was settled by agreement in 1974. The EEC agreed to increase US market access for, *inter alia*, tobacco, citrus fruits, kraft paper, certain tractors and other machinery, diesel engines, pumps and plywood.

The most recent Working Party report, on the FTA between Canada and the US, failed to determine whether the waiver by the US under that Agreement of its customs user fee in respect of *imports from Canada only* (FTA, Article 403:3) was legitimate in terms of Article XXIV:5(b). Other GATT parties trading with the US might be bearing a disproportionate share of this burden, since the FTA entered into force in January 1989. But this was impossible to determine on the available data. This example shown that issues raised by RTAs under Article XXIV are wider and more complex that a simple arithmetical comparison of pre- and post-RTA customs tariffs with the tariffs bound under the GATT. (BISD 38th Supp. 47 at 59–60, 74.)

Condition II. The RTA must cover "substantially all the trade" between the parties.

This requirement has been called "troublesomely ambiguous" (Jackson, 1993). The GATT Working Party which looked at the EFTA Convention in 1960 was unable to reach agreed final conclusions, being troubled especially by the fact that commitments to elimination of trade barriers in the EFTA did not apply to trade in agricultural products. Side agreements on agriculture concluded by the EFTA countries were invoked by them as evidencing the consistency of EFTA with Article XXIV because these agreements facilitated the expansion of trade in agricultural products, but the EFTA countries admitted that barriers on such trade would remain for two-thirds of total trade in agricultural products between them. The EFTA countries relied on "the margin permitted by the phrase 'substantially all the trade'". (GATT, BISD 9th Supp. 70, quoted in Jackson & Davey, 458). Several members of the Working Party on the Canada–US FTA doubted whether it covered "substantially all the trade" between the parties. Various provisions on specific agricultural products were the object of members' concerns. (See BISD 38th Supp. at 65, 73).

It should also be noted that Article XXIV does not require *approval* of a RTA by the GATT CONTRACTING PARTIES. Any GATT party deciding to enter into such an arrangement must *notify* the CONTRACTING PARTIES which can then make reports or recommendations to contracting parties (para. 7/a/). Moreover the CONTRACTING PARTIES may approve proposals for a RTA which do *not* fully comply with Article XXIV's conditions (para. 10). Such a decision ("waiver") needs a two-thirds majority of GATT parties belonged to one or another regional arrangement (Jackson, 1969, 588).

This might not be true today, given the greatly increased membership of the GATT (now some 111 parties), although several more RTAs have been formed since 1970.

3.3. Overall Assessment of Article XXIV

With the general reductions in tariff levels achieved in the several GATT rounds of multilateral negotiations since 1960 (with further reductions anticipated from the Uruguay Round due to be completed in December 1993) the margins of preference afforded to States members of RTAs have grown progressively smaller. However, there remain tangible and significant advantages to such membership in the other forms of liberalisation, particularly the removal of quantitative restrictions and measures with equivalent or comparable effect. Concern is expressed by economic and political commentators that the trading world is being divided into competing blocs, and that this trend has perhaps gone so far as to distort the basic GATT multilateral and non-discriminatory principles, leaving them as a residual framework for that part of world trade not conducted either among members of RTAs *inter se* or in accordance with bilateral or inter-bloc arrangements negotiated outside the GATT.

The Board of the IMF has recently urged all countries, especially the major industrial nations, to ensure that RTAs are consistent with the GATT, and that they support the multilateral trade system. States entering RTAs were "encouraged to ensure that such arrangements do not increase the average level of protection against non-members". (IMF, *Annual Report 1992*, 67.) Many developing countries are concerned that they face increased marginalisation in a world of growing RTAs. (See also the remarks of the then Director-General of GATT, Arthur Dunkel, in May 1993, quoted in the Annex to this paper.)

Jackson & Davey (1986, 455) observed that of the large number of RTAs claiming Article XXIV exception, arguably only very few genuinely qualified. Yet even in doubtful cases the RTA and its preference system have been "*tolerated*" either by *explicit waiver*[2] or merely by *inaction*. These authors concluded: "Legal arguments have often been ignored or resulted in a standoff without resolution". (*id.*) In many cases, it is doubtful whether the arrangements comply with Article XXIV criteria. "Yet there has not yet been a concrete 'turn down' by the GATT system." (Jackson, 1993, at 127.)

The Working Party on the Canada–US FTA noted that examination of the Agreement had revealed some areas which, in the view of some members, remained questionable in terms of GATT requirements (Article XXIV and some other provisions). The Working Party was *unable to reach agreed conclusions as to the consistency* of this FTA with the GATT. It limited itself to reporting to the GATT Council the views of its members. The two States were to be invited by the CONTRACTING PARTIES to submit reports on the operation of the FTA, beginning in 1993. (BISD 38th Supp. 76.)

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2 Article XXIV: 10, or Art. XXV: 5 under which the CONTRACTING PARTIES can waive, by two-thirds majority, any GATT obligation in exceptional circumstances not otherwise provided for.

So, is the present position a "free for all"? Has Article XXIV been effectively "repealed" by the subsequent practice of the GATT CONTRACTING PARTIES? (*Cf.* Vienna Convention on the Law of Treaties, Articles. 31 /3/ (b) and 39.)

4. Proposals for Reform of Article XXIV

Whatever the "answer" to the above question might be as regards RTAs already established and notified to the GATT, clearly the GATT members involved in the Uruguay Round negotiations consider Article XXIV to be both in force, as a matter of law, and of some potential, practical utility for the multilateral trade system. They have addressed the recognised deficiencies in the wording of the article and have drafted a formal *Understanding on the Interpretation of Article XXIV* which is to be part of the Agreements and Decisions embodying the results of the Uruguay Round. The text of this draft Understanding is attached (with the exception of the paragraphs relating to Article XXIV: 12 which is outside the scope of this paper).

Note. Since this paper was delivered the Uruguay Round negotiations were concluded, in December 1993, and among the instruments adopted was the *Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade.* This Understanding, together with those relating to other GATT Articles, is deemed to be an integral part of the GATT 1994. This GATT 1994 is annexed to and forms part of the new Agreement Establishing the Multilateral Trade Organization, and will be binding on all Members of the MTO. The GATT 1994 comprises the provisions of the 1947 GATT Agreement, *excluding* the Protocol of Provisional Application, as amended or modified by subsequent instruments which entered into force prior to the entry into force of the MTO Agreement; together with several multilateral trade agreements, and the Understandings, adopted at the conclusion of the Uruguay Round. The General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights, and the Understanding on Rules and Procedures Governing the Settlement of Disputes are separate agreements, not forming part of the GATT 1994.

With regard to the *Understanding of Article XXIV,* drafting changes were made, to replace references to the CONTRACTING PARTIES with references to the Council on Trade in Goods created in the MTO Agreement, and to substitute references to the GATT 1947 or the GATT 1994 for references to "the GATT", as appropriate. The Dispute Settlement paragraph (para. 12) was slightly altered. No change of substance to the draft text was made. Accordingly, it is proposed to leave unchanged the following comments made in this paper on the *draft* text.

1. *Preamble* Whereas Article XXIV: 4 already recognizes the *desirability* of increasing freedom of trade by agreements for closer economic integration between the parties to such agreements, this Understanding adds the assertion that closer integration between the economies of parties to customs unions or FTAs may *contribute to the expansion of world trade.*

2. *Preamble* Article XXIV: 8 with its criterion of "substantially all the trade" remains in force and unamended, but its interpretation will surely receive a firm steer from the statement that contribution to trade expansion is increased if the elimination of tariffs and other restrictions on trade between parties to a RTA "*extends to all trade, and* [is] *diminished if any major sector of trade is excluded*".

3. *Preamble* The GATT parties declare the need to *reinforce the effectiveness* of the role of the CONTRACTING PARTIES in *reviewing* agreements notified under Article XXIV. Criteria and procedures for *assessment of new or enlarged agreements* need clarification; and *all* Article XXIV agreements need to have *improved transparency*. This last point is made operational in para. 11 which builds on the CONTRACTING PARTIES' instruction to the GATT Council concerning Reports on Regional Arrangements. This 1971 instruction went no further than to ask the Council to establish a calendar for the examination of reports of preferential agreements every two years (BISD 18th Supp. 38). Para. 11 would require States to notify *changes* in their agreements "as they occur".

4. *Para. 1* The *mandatory nature* of the requirements of paras. 5, 6, 7 and 8 of Article XXIV is expressed clearly, something which is lacking in the rather permissive and ambiguous formulation of the article as it stands.

5. *Para. 2* offers a potentially useful and agreed *methodology* for evaluating the "*general incidence*" of customs tariffs and other trade measures ("regulations of commerce").

6. *Para. 3* attempts to pin down the "*reasonable length of time*" for interim agreements, but allows this period should exceed 10 years if the CONTRACTING PARTIES decide so. At least, the onus is on the parties to such an agreement to justify the need for a longer period.

7. *Paras. 4 and 5* try to firm up the negotiating procedure for compensatory adjustments. The principle that negotiations should be conducted *in good faith* with a view to reaching a mutually satisfactory adjustment is introduced into the text—a welcome addition from general international law doctrine and case law. Negotiating States are given specific criteria and guidelines to observe, the existing rights and to modify or withdraw concessions pursuant to Article XXVIII are affirmed.

8. *Para. 7* will apply to any notification under Article XXIV: 7(a) made *after* the Understanding enters into force. It will cover notifications of proposed customs unions or FTAs as well as of interim agreements. Notice the reference here to *para. 1* of the Decision (Understanding).

9. *Paras. 8–10* usefully clarify the powers of working parties in relation to interim agreements, building on Article XXIV: 7.

10. *Para. 12 Dispute Settlement.* The text as adopted reads "The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Understanding on Rules and Procedures Governing the Settlement of Disputes may be invoked". This paragraph provides only for the invocation of GATT Articles XXII and XXIII (the dispute settlement provisions, together with the 1979 Understanding, BISD 26th Supp. 210) with respect to matters *arising from the application of Article XXIV provisions*

relating to RTAs or interim agreements. It does not, and could not, provide for the GATT dispute settlement clauses to be invoked by parties to a RTA in a dispute arising from the interpretation or application of that RTA. Several RTAs have their own dispute settlement procedures and institutions, e.g. the EEC; the North American FTA; the EFTA. However, it remains open for any GATT contracting party which considers that any GATT benefit is being nullified or impaired by the application by another GATT party of same trade measure required by that party's membership of a RTA, to invoke Article XXIII and to seek resolution of that dispute within the GATT forum.

5. Conclusion

Given the patent weakness and deficiencies of Article XXIV revealed in the practice of the past 35 years, and given the proliferation of RTAs in almost all parts of the world, involving the majority of GATT parties, a radical proposal would be to delete this article completely from the GATT, and leave it to any aggrieved GATT party to invoke Article XXIII seeking a remedy for "nullification or impairment" of trade benefits caused by RTAs of other countries with which it trades. But, unsurprisingly, the governments of GATT parties have not chosen this radical course. Instead, they have accepted, as part of the Uruguay Round package, an *Understanding* on Article XXIV which promises a more effective application of its clauses, which have the force of law for all GATT parties, to future RTAs. This development is to be welcomed if it lessens distortions to the multilateral and liberalising framework for world trade which GATT seeks to maintain.

At the very least, increased transparency concerning RTAs, and periodic reviews of such arrangements by GATT working parties must be considered positive steps. From the point of view of the development of GATT law, the possibility of resort to GATT dispute settlement procedures for Article XXIV issues may also be seen as a modest benefit. The outcome of these procedures is normally a Panel Report which has to determine the consistency or otherwise with GATT obligations of the trade measures or *inter se* agreements applied by other GATT parties, to the alleged detriment of the complainant State or States. Determination of a specific complaint in this way could lead to greater certainty and clarity of relevant GATT provisions, something which has been lacking in past reports of Working Parties under Article XXIV.

* * *

References

El-Agraa, ed. *International Economic Integration* (2nd ed. 1988, Macmillan Press Ltd.)
Jackson & Davey, *Legal Problems of International Economic Relations* (2nd ed. 1986, West Publishing Co.)
Jackson, "Regional Trade Blocs and the GATT", 16 *World Economy* (1993) 121
GATT, *Basic Instruments and Selected Documents,* various Supplements.

ANNEX

Extract from speech by the then Director-General of the GATT, Arthur Dunkel, in Seoul, to the Pacific Basin Economic Council, May 1993:

"I would say that the growth of regional trading arrangements would become a threat to the multilateral system only if these groupings were to turn inward on themselves, erect new trade barriers, and become hostile blocs. The world last saw this in the 1930s ... I remain confident that the world's political leaders will not forget—and will not be allowed to forget—the painful lessons of our recent past."

"Openness is the touchstone for regional agreements. It describes trade agreements which make a net addition to the volume of world trade rather than just diverting it; which break down existing trade barriers without erecting new ones; and of course, which follow GATT rules."

From: *GATT Focus,* No. 99, May–June 1993, p. 1.

GATT Article XXIV (extracts)

3. The provisions of this Agreement shall not be construed to prevent:

(a) Advantages accorded by any contracting party to adjacent countries in order to facilitate frontier traffic;

4. The contracting parties recognise the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognise that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

5. Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area;

Provided that:

(a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;

(b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the

constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement, as the case may be; and

(c) any interim agreement ... shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

6. If, in fulfilling the requirements of sub-paragraph 5(a), a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reductions brought about in the corresponding duty of the other constituents of the union.

7. (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.

[paras. (b) and (c) relate to plans and schedules for interim agreements.]

8. For the purposes of this Agreement:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce ... are eliminated with respect to substantially all the trade between the constituent territories of the union ..., and,

(ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;

(b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

9. The preferences referred to in paragraph 2 of Article I shall not be affected by the formation of a customs union or of a free-trade area but may be eliminated or adjusted by means of negotiations with contracting parties affected...

10. The CONTRACTING PARTIES may by a two-thirds majority approve proposals which do not fully comply with the requirements of paragraphs 5 to 9 inclusive, provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this article.

[Para. 11 relates to special arrangements for trade between India and Pakistan. Para. 12. the final paragraph of Article XXIV, concerns measures to be taken by contracting parties to ensure observance of the GATT by regional and local authorities in their territories.]

U. Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade

Preamble

The CONTRACTING PARTIES

Having regard to the provisions of Article XXIV of the General Agreement;

Recognising that customs unions and free trade areas have greatly increased in number and importance since the establishment of the GATT, and today cover a significant proportion of world trade;

Recognising the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreement;

Recognising also that such contribution is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded;

Reaffirming that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other contracting parties;

Convinced also of the need to reinforce the effectiveness of the role of the CONTRACTING PARTIES in reviewing agreements notified under Article XXIV, by clarifying the criteria and procedures for the assessment of new or enlarged agreements, and improving the transparency of all Article XXIV agreements;

Recognising the need for a common understanding of the obligations of contracting parties under Article XXIV:12;

Agree as follows:

1. Customs unions, free trade areas, and interim agreements leading to the formation of a customs union or free trade area, to be consistent with Article XXIV, must satisfy the provisions of its paragraphs 5, 6, 7 and 8 *inter alia.*

Article XXIV:5

2. The evaluation under Article XXIV:5(a) of the general incidence of the duties and other regulations of commerce applicable before and after the formation of a customs

union shall in respect of duties and charges be based upon an overall assessment of weighted average tariff rates and of customs duties collected. This assessment shall be based on import statistics for a previous representative period to be supplied by the customs union, on a tariff line basis and in values and quantities, broken down by GATT country of origin. The GATT Secretariat shall compute the weighted average tariff rates and customs duties collected in accordance with the methodology used in the assessment of tariff offers in the Uruguay Round. For this purpose, the duties and charges to be taken into consideration shall be the applied rates of duty. It is recognised that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required.

3. The "reasonable length of time" referred to in Article XXIV:5(c) should exceed ten years only in exceptional cases. In cases where contracting parties believe that ten years would be insufficient they shall provide a full explanation to the CONTRACTING PARTIES of the need for a longer period.

Article XXIV:6

4. Paragraph 6 of Article XXIV establishes the procedure to be followed when a contracting party forming a customs union proposes to increase a bound rate of duty. In this regard it is reaffirmed that the procedure set forth in Article XXVIII, as elaborated in the guidelines adopted by the CONTRACTING PARTIES on 10 November 1980 (27S/26) and in the 1990 Decision on Article XXVIII, Modification of Schedules, of the CONTRACTING PARTIES, must be commenced before tariff concessions are modified or withdrawn upon the formation of a customs union or an interim agreement leading to the formation of a customs union.

5. It is agreed that these negotiations will be entered into in good faith with a view to achieving mutually satisfactory compensatory adjustment. In such negotiations, as required by Article XXIV:6, due account shall be taken of reductions of duties on the same tariff line made by other constituents of the customs union upon its formation. Should such reductions not be sufficient to provide the necessary compensatory adjustment, the customs union would offer compensation, which may take the form of reductions of duties on other tariff lines. Such an offer shall be taken into consideration by the contracting parties having negotiating rights in the binding being modified or withdrawn. Should the compensatory adjustment remain unacceptable, negotiations should be continued. Where, despite such efforts, agreement in negotiations on compensatory adjustment under Article XXVIII cannot be reached within a reasonable period from the initiation of negotiations, the customs union shall, nevertheless, be free to modify or withdraw the concessions; affected contracting parties shall then be free to withdraw substantially equivalent concessions in accordance with Article XXVIII.

6. The General Agreement imposes no obligation on contracting parties benefiting from a reduction of duties consequent upon the formation of a customs union, or an interim

agreement leading to the formation of a customs union, to provide compensatory adjustment to its members.

Review of Customs Unions and Free Trade Areas

7. All notifications made under Article XXIV:7(a) shall be examined by a working party in the light of the relevant provisions of the General Agreement and of paragraph 1 of this Decision. The working party shall submit a report to the CONTRACTING PARTIES on its findings in this regard. The CONTRACTING PARTIES may make such recommendations to contracting parties as they deem appropriate.
8. In regard to interim agreements, the working party may in its report make appropriate recommendations on the proposed timeframe and on measures required to complete the formation of the customs union or free trade area. It may if necessary provide for further review of the agreement.
9. Substantial changes in the plan and schedule included in an interim agreement shall be notified, and shall be examined by the CONTRACTING PARTIES if so requested.
10. Should an interim agreement notified under Article XXIV:7(a) not include a plan and schedule, contrary to Article XXIV:5(c), the working party shall in its report recommend such a plan and schedule. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations. Provision shall be made for subsequent review of the implementation of the recommendations.
11. Customs unions and members of free trade areas shall report periodically to the CONTRACTING PARTIES, as envisaged by the CONTRACTING PARTIES in their instruction to the GATT Council concerning reports on regional agreements (18S/38), on the operation of the relevant agreement. Any significant changes and/or developments in the agreements should be reported as they occur.
Dispute Settlement
12. The dispute settlement provisions of the General Agreement may be invoked with respect to any matters arising from the application of those provisions of Article XXIV relating to customs unions, free trade areas or interim agreements leading to the formation of a customs union or free trade area.

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Association Agreements between the EC and Central and Eastern European States

I. Introduction

The second half of the 1980s was an extraordinarily hopeful time for the people of Western, Central and Eastern Europe. Waves of euphoria swept the continent as the European Community (EC) rushed headlong to complete its internal market by the end of 1992, and as the countries of the former Soviet bloc one by one cast aside the Iron Curtain that had enshrouded them for decades. Everyone stretched out his arms to embrace the other, and the strong helped the weak, no questions asked. It was a rare period of virtually unconditional brotherly love. It could not last.

It did not. The tide began to turn in the early 1990s, as the bloom faded from the EC rose, as Yugoslavia fell apart, as the enormity of the task of transforming the Central and East European economies became apparent, and, not coincidentally, as the global recession deepened. No one but the most hardened Eurocynic, however, would have predicted the severity of the EC's reversal of fortune and the accompanying shift in attitudes.

At the close of the celebrated 1992, the European Community was in a state of political and economic disarray. EC self-doubt—unleashed by the Maastrich debacle, by its inadequate response to the civil war in former Yugoslavia, and by recession and intractable disputes with its trading partners—rendered the Community a less dashing knight to the distressed reform economies in Central and Eastern Europe. Yet these countries continued to wait for some kind of miraculous rescue.

To be fair, the countries of Central and Eastern Europe have good cause to be impatient for marked improvement in their economic situation, since they reasonably fear

the political instability that lurks just around the bend. And to its credit, the EC has stayed a steady course with its ardent neighbours, even while rocked by ongoing internal crises. The Community has moved steadily to assist the transformation by providing funds[1] and expertise, and also to extend the privileges and responsibilities of integration to ever more European countries through a network of bilateral association agreements.[2]

Association agreements that establish increased trade, dialogue and cooperation between the EC and the countries of Central and Eastern Europe have proliferated in recent years. Yet still the relationship between the EC and countries in this region has been characterized by a significant degree of mutual misunderstanding and dissatisfaction. On one side, the high expectations of the Central and East European countries are reflected in their equally high disappointment levels *vis-à-vis* the EC. And on the other side, one senses that the EC grows weary of what it perceives as complaints and ingratitude.

Against this background, I propose to examine two related issues. First, I will describe the nature and assess, the strengths and weaknesses of the association agreements themselves. And second, I will examine some recent developments in the relations between the EC and the countries of Central and Eastern Europe, notably the Memorandum submitted by the Visegrad Group of countries[3] to the EC in October 1992, and the EC's response to the demands raised therein, in order to assess the current state of relations.

II. The Association Agreements

In December 1991, the EC concluded bilateral association agreements with the countries comprising the Visegrad Group, *viz.* Czechoslovakia, Hungary and Poland. These treaties, which were entitled "Europe Agreements" in order to distinguish them from previous forms of association,[4] establish a framework for political and economic integration over a ten-year term. Often referred to as "Second Generation" agreements to further distinguish them from earlier trade and cooperation (or so-called "First

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1 Funds have been made available directly to countries in the region through the PHARE (Poland/Hungary: Assistance for Restructuring of the Economy) and TACIS (Technical Assistance to the Commonwealth of Independent States) programs. See also Proposal for a Commission Decision granting a Community guarantee to the European Investment Bank against losses under loans for projects in Central and East European countries (Poland, Hungary, the Czech Republic, the Slovak Republic, Romania, Bulgaria, Latvia, Estonia, Lithuania and Albania), COM(93) 212 final, OJ 1993 C 160/8.

2 Article 238 of the Treaty of Rome provides that association agreements "involving reciprocal rights and obligations, common action and special procedures ... shall be concluded by the Council, acting unanimously and after receiving the assent of the European Parliament which shall act by an absolute majority of its component members".

3 Hungary, Poland, the Czech Republic and the Slovak Republic (then Czechoslovakia) began to coordinate their positions in 1991 during their respective negotiations with the EC on the conclusion of bilateral association agreements.

4 See Communication from the Commission to the Council on Association Agreements with the Countries of Central and East Europe: General Framework, COM(90) final 398 (27 August 1990).

Generation") agreements, the Europe Agreements represent a giant step on the long road toward integration, which actually began decades before the recent democratic revolutions. Each of the first three Europe Agreements in fact replaced an earlier bilateral First Generation trade and cooperation agreement, which in turn had replaced even earlier trading arrangements between the EC and the Visegrad countries. The same is true for the Europe Agreements that the EC concluded with Romania and with Bulgaria in late 1992.

In addition to the Europe Agreements, the EC is expanding its network of trade normalization agreements with other countries in the region. For exempla, the EC has recently concluded First Generation trade and cooperation agreements with Albania[5] and Slovenia.[6] One unique feature of these agreements is that they contain a clause expressly requiring regard for democratic principles and human rights.[7] Similar agreements were concluded with Estonia, Latvia and Lithuania early in 1992.[8] Relations with some members of the Commonwealth of Independent states are evolving as well. For example, negotiations with Russia and Ukraine for a new, intermediate type of "partnership and cooperation" agreement[9] were recently resumed, after having been stalled by controversy.[10] Talks have also begun with Belarus, Kazakstan and Kirghizstan. The Commission views (1) Are the following: the First Generation agreements as an interim step, and has stated that Europe Agreements should progressively be concluded with all eligible Central and East European countries.[11]

The key difference between the First and Second Generation agreements lies in the nature of trade they envisage. The First Generation trade and cooperation agreements only

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5 Agreement between the EEC and Albania on trade and commercial and economic cooperation, OJ 1992 L 343/2, implemented by Council Decision 92/535 of 26 October 1992 OJ 1992 L 343/1.

6 Cooperation Agreement between the EEC and the Republic of Slovenia, signed 5 April 1993 and implemented by Council Decision 93/407/ EEC of 19 July 1993 OJ 1993 L 189/1 (effective 1 September 1993), plus protocol on financial cooperation and agreement in the field of transport.

7 Similar provisions appear in the Europe Agreements with Romania and Bulgaria, as well as in the renegotiated agreements with the Czech and Slovak Republics, but do not appear in the earlier Europe Agreements with Hungary and Poland.

8 The Baltic States concluded a free trade area among themselves on 13 September 1993 for the purpose of facilitating faster integration into the EC.

9 These agreements will have a wider scope than traditional First Generation agreements and will cover an extensive range of trade, economic, and political relations over a ten-year term.

10 Russian has objected to the clause permitting the EC to suspend benefits in case of human rights violation and has demanded that the agreement contain an "evolution" or "future events" clause permitting the agreement to be converted to a free trade agreement when circumstances warrant. See *Agence Europe*, Nr. 5993, p. 9 (4 June 1993). Ukraine has insisted that it receive the same treatment as Russia.

11 Commission "Guidelines on the Future of Relations between the EC and Central and Eastern Europe" (December 1992), *reprinted in Agence Europe Documents*, Nr. 1814, p. 2 (9 December 1992) (hereinafter Commission Guidelines). The Copenhagen European Council (June 1993) invited the Commission to submit proposals for developing the EC's existing trade agreements with the Baltic States into free trade agreements, and to conclude Europe Agreements with these countries as soon as the necessary conditions have been met. Conclusions of the Presidency, Copenhagen European Summit, *reprinted in Agence Europe Documents*, Nr. 1844/45, Art. 7 (B), p. 6 (24 June 1993).

purport to normalize trade relations by providing most-favoured-nation treatment and by progressively removing quantitative restrictions. The Europe Agreements, on the other hand, aim to establish a free trade area by the end of the ten-year term, at least with respect to certain products. This means that the Europe Agreements provide preferential access to the EC market for products originating in the territory of the Associated country. Even more important, the Europe Agreements are based on the principle of asymmetric trade liberalization, which means that the EC must open up its market to products from the associated countries quicker that those countries must open their markets to products originating in the EC.

However, it is not just the nature of the trade envisaged that differentiates the Europe Agreements from the more primitive First Generation agreements. Although both types of agreement call for certain forms of cooperation and contain an institutional component, the Europe Agreements go much further than the simple trade and co-operation agreements. In addition to their more extensive cooperation and institutional components, the Europe Agreements contain innovative provisions calling for high-level political dialogue (to include matters of foreign policy and defence); for progressive liberalization of the movement of persons, services and capital; and for gradual approximation of laws by the associated country. These provisions show that association under the Europe Agreements is meant to serve as a training ground for full EC membership, in addition to fostering economic development through the establishment of a free trade area.

Unfortunately, the Europe Agreements have proven to be somewhat less than they appear. The first major problem is that they have not yet entered into force, since some EC Member States have failed to complete the ratification process.[12] Fortunately, major portions of the Europe Agreements fall within exclusive EC competence in the field of commercial policy, and thus can be implemented by a decision of the competent EC organ.[13] Still, failure to implement the Europe Agreements in their entirety means that many of their significant innovations have not yet been put into practice. The associated countries are especially looking forward to receiving the extensive economic, cultural and financial cooperation that the EC has promised.

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12 The Europe Agreements with the Visegrád countries were supposed to enter into effect on 1 January 1993. However, the agreement between the EC and the Czech and Slovak Federal Republic had to be renegotiated following that country's split-up on 1 January 1993. The renegotiated agreements between the EC and the Czech and the Slovak Republics, respectively, were initialled on 23 June 1993.

13 Interim Agreements to implement the trade and trade-related parts of the Europe Agreements with Czechoslovakia, Hungary and Poland entered into effect on 1 March 1992 and were renewed for an indefinite period on 31 December 1992. See OJ 1992 L 114 (Poland); OJ 1992 L 115 (Czechoslovakia); and OJ 1992 L 116 (Hungary). The Interim Agreement with Romania was implemented by Council Decision 93/186/EEC of 8 March 1993, OJ 1993 L. 81. The Interim Agreement with Bulgaria was delayed by controversy which was reportedly resolved in July 1993. However, no Interim Agreement between the EC and Bulgaria has been implemented as of this date.

A second set of problems, less easily solved than the foregoing, stems from the protectionism that is built into the agreements. First, even the most far-reaching Europe Agreement grants only limited access to those sensitive sectors of the EC market, such as agriculture, steel and textiles, in which the Central and East European countries are likely to have a comparative advantage. Secondly, the association agreements permit both parties to invoke safeguard and other trade protection measures against products originating in the other party's territory.[14] The EC has already made use of these various opportunities—much to the dismay of the associated countries—for example by invoking protective measures to stop the spread of hoof and mouth disease; by imposing antidumping duties, such as on imports of seamless pipes & tubes of iron or non-alloy steel coming from *inter alia* Hungary and Poland;[15] and by invoking safeguard measures to reimpose quotas on steel from the Czech and Slovak Republics.[16] Finally, it has been observed that the Europe Agreements have in fact resulted in an increase in the EC's trade surplus with the associated countries, despite the asymmetric structure that was intended to favour exports from the associated countries to the EC.[17]

Third problem is the lack of aspirational mutuality between the parties to the various Europe Agreements. Each of these association agreements recognizes that full EC membership is the ultimate goal of each associated country, but make neither accession—nor even the commencement of accession negotiations—automatic at the end of the ten-year transition period. The Europe Agreements nowhere state that eventual accession is the EC's goal as well. The Visegrad countries noticed that their yearning for ever closer union was unrequited by the EC, and began to doubt the sincerity of Community's intentions.

Although some might argue that the associated countries are hardly in a position to bargain, the vanguard Visegrad countries have not hesitated to press their claims with the EC. It is nothing less than remarkable that they have been as successful as they have in the past year, both in gaining the troubled Community's ear, and in eliciting further concessions.

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14 Under the Europe Agreements, the associated countries may take "exceptional measures of limited duration" in order to protect "infant industries or certain sectors undergoing restructuring or facing serious difficulties".

15 See Council Regulation 1189/93 of 14 May 1993, OJ 1993 L 120/34.

16 Decision No. 1/93 of the EC-Czech Republic and Slovak Republic Joint Committee of 28 May 1993, OJ 1993 L 157/59; Commission Decision 1970/93/ECSC of 19 July 1993 opening and providing for the administration of tariff quotas in respect of certain ECSC products originating in the Czech Republic and the Slovak Republic imported into the Community (1 June 1993 to 31 December 1995), OJ 1993 L 180/10.

17 Polish Prime Minister Hanna Suchocka wrote a letter to the EC Heads of Government and to Commission President Jacques Delors in which she stated: "Our expectations have not been fulfilled. Today we are witnessing a sizeable trade deficit with the Community, in excess of one-eighth of all our exports to the EC. That deficit points to inequality that contradicts what was intended by the Agreement ...[and] clearly indicates that the Community is the main beneficiary of the Europe Agreement". Agence Europe, Nr. 5995, p. 9 (4 June 1993) (hereinafter Suchocka Letter).

III. Recent Developments in the Relations between the EC and the Associated Central and Eastern European States

The EC and the associated countries agreed in principle that the framework established by the Europe Agreements must be fully exploited and even extended in order to further the process of transformation and integration.[18] They have differed, over how to achieve this shared goal.

The Visegrad countries stated their position in a joint memorandum "on strengthening their integration with the European Communities and on the perspective of accession", which they submitted to the Commission and the Presidency in September 1992. In the 1992 Visegrad Memorandum, the associated countries asked the EC to establish specific criteria and a timetable for accession.[19] In addition, they issued the call to "speed up the process" by strengthening political and financial cooperation, as well as by accelerating economic integration. The Commission responded by issuing "Guidelines on the Future of Relations between the EC and Central and Eastern Europe" in December 1992.[20] In anticipation of the meeting of the European Council on 21–22 June 1993 in Copenhagen, the Visegrad countries submitted a second joint memorandum in which they expressed their overall (but not complete) support for the Commission's position, and emphasized the importance which they attached to the outcome of that meeting.[21]

The Copenhagen Summit represents a milestone for those Central and East European countries that already have concluded or may in future conclude Europe Agreements with the EC. Among the many significant conclusions of that European Council, I wish to emphasize four: conclusions concerning accession; political cooperation; trade liberalization; and other forms of cooperation.

A. Accession

The Treaty of Rome provides that any European State may apply to become a member of the Community.[22] The Commission elaborated three criteria to determine the eligi-

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18 Joint Statement of EC and Visegrad Foreign Ministers (5 October 1992 Luxembourg Summit), EC Bull. 10-1992, § 2. 3. 1., point 5 (agreeing that cooperation under the Europe Agreements should focus on "consolidating and extending progress"); "Europe and the Challenge of Enlargement", EC Bull. Supplement 3/92, p. 18 (hereinafter commission Enlargement Report).

19 In particular, they expressed their wish to join the Union "at the latest at the end of this century", and requested that formal negotiations on full membership start in 1996, more or less simultaneously with the mid-term review called for under the Europe Agreements.

20 These Commission Guidelines, *supra* note 11, were debated and subsequently approved (with some modifications) by the General Affairs Council that met in Luxembourg in early June 1993.

21 The Suchocka Letter, *supra* note 17, called for the European Council to give a clear political message confirming the Community's will to see Poland and the other associated countries as future members of the European Union; to accelerate and improve access of Polish products to the Community market; and to increase EC aid and make it available for economic and investment (rather than just technical) purposes.

22 Article 237. Article O of the Treaty on European Union provides the same with respect to membership in the Union.

bility of a country that applies for membership: European identity, democratic status, and respect for human rights.[23] These principles are broadly reflected in the preamble of the Europe Agreements.[24]

The Copenhagen Summit Conclusions did not only state more particularly formulated criteria for membership, but also established the "objectives of membership" and affirmed that "the associated countries in Central and Eastern Europe that so desire shall become members of the European Union".[25]By this step, the unilateral wish of the associated countries to join the EC becomes a shared goal. Although no specific date has been laid down for the commencement of accession negotiations, as was urged in the 1992 in the Visegrad Memorandum, the Copenhagen Summit Conclusions provided that, the accession can take place as soon as the associated country is "able to assume the obligations of membership by satisfying the economic and political conditions required".

The eligibility criteria enunciated in Copenhagen are virtually identical to those first proposed in the Commission Guidelines[26] in December 1992. First, the associated country must achieve "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for protection of minorities". Second, the associated country must have a "functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union". Finally, the associated country must be capable of taking on the obligations of membership (i.e. the *acquis communautaire*) and must adhere to the aims of political, economic and monetary union.

These Copenhagen Summit Conclusions on accession are welcome, not least because they can themselves contribute towards achieving the goals they establish by encouraging further democratic reforms and foreign investment. Yet reasonable grounds for dissatisfaction still remain. First, the Copenhagen Summit Conclusions undercut the value of the accession provisions by reminding the associated countries that accession will ultimately hinge on the "Union's capacity to absorb new members, while maintaining the momentum of European integration". Thus, the EC still views relations with Central and Eastern Europe as a subissue in its debate over deepening versus widening the Community. Secondly, the community has failed to provide a timetable for evaluating the associated countries'progress in fulfilling the enunciated criteria. The Central and East European countries hope that this process will begin during the mid-term review called

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23 Commission Enlargement Report, *supra* note 18. In particular, the Commission emphasized the applicant's "acceptance of the Community system, and its capacity to implement it" (which "presupposes a functioning and competitive market economy, and an adequate legal and administrative framework in the public and private sector"), as well as the applicant's acceptance and ability to implement "the common foreign and security policy as it evolves over the coming years".

24 For example, the preamble to the Hungarian Europe Agreement states that the "basis for association" is Hungary's "commitment to pluralist democracy based on rule of law, human rights and fundamental freedoms, [to] a multiparty system involving free and democratic elections, to the principles of a market economy and to social justice".

25 Copenhagen European Council, Conclusions of the Presidency, *reprinted in Agence Europe Documents*, Nr. 1844/45, art. 7. (A) (iii), p. 5 (24 June 1993).

26 *Supra* note 11.

for in each of the Europe Agreements, but it is by no means assured. Finally, the accession criteria do little more than restate the obvious, and provide little concrete guidance. Yet it is hardly realistic to expect the EC to tie itself to particular criteria at a time when the entire nature of the Community is changing.

B. Political Cooperation

Central and East European countries have expressed a strong desire to participate fully in the formulation of the future architecture of Europe. Both the EC and the Visegrad countries readily agree on the need to deepen the political dialogue established under the Europe Agreements.[27] While substantial agreement prevails at this level of generalities, traces of disharmony emerge upon closer examination. There are two primary sources of tension.

The first problem in the area of political cooperation concerns the nature of cooperation contemplated. The 1992 Visegrad Memorandum expressly sought "gradual incorporation ... into the political cooperation of the European Communities, especially via direct linking to the Common Foreign and Security Policy as of January 1, 1993". This has not happened. Instead, the Copenhagen European Council proposed that the associated countries enter into a "structured relationship with the Intitutions of the Union" concerning "dialogue and concertation [sic] on a broad range of topics and in several fora".[28] This purely advisory discussion framework will encompass diverse matters of common interest, including areas of Community policy,[29]common foreign and security policy, and home and judicial affairs. It provides for regular meetings at various levels of government, with enlarged Council meetings as the primary forum for discussion.[30]

The "structured relationship" for political cooperation appears to be derived from the Commission's earlier proposal to create a "European Political Area" as a means of extending the basis of political cooperation beyond the Europe Agreements, but without

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27 The Europe Agreements call for regular political dialogue to consider issues arising under the association agreements themselves, as well as any other bilateral or international issues of mutual interest. The institutional framework will be composed of an Association Council, an Association Committee, and an Association Parliamentary Committee.

28 Copenhagen European Council, Conclusions of the Presidency, *Agence Europe Documents*, Nr. 1844/45, art. 7(A) (iv), pp. 5–6 (24 June 1993).

29 Particularly those with a trans-European dimension, such as energy, environment, transport, science and technology.

30 For example, the Copenhagen Summit Conclusions call for one Troika meeting at the level of Foreign Ministers and one at the level of political directors during each Presidency; a briefing at secretariat level after each General Affairs Council and each meeting of the political directors; one Troika meeting at Working Group level per Presidency for relevant Working Groups; and regular Troika consultations with the United Nations General Assembly and the Conference for Security and Cooperation in Europe. Copenhagen European Council, Conclusions of the Presidency, *Agence Europe Documents*, Nr. 1844/45, annex II, p. 11 (24 June 1993).

interfering with "the Community's own autonomous development".[31] The 1992 Visegrad Memorandum responded cautiously to this proposal, since the associated countries feared it would be viewed by the EC as a substitute for full membership. In the wake of the Copenhagen European Council's adoption of the objective of membership, this fear has been succeeded by cautious optimism about the new framework for political cooperation, even though it grants less than the associated countries had hoped for.

The second problem in the area of political cooperation concerns the multilateral framework proposed by the EC. Although the Europe Agreements themselves are bilateral, the "structured relationship" for political cooperation is designed to include all the associated Central and East European countries.[32] The EC has repeatedly emphasized that such dialogue should be carried out on a multilateral basis. In addition, the EC has urged the associated countries (in particular, the Visegrad countries) to pursue regional cooperation. This is a very sensitive issue. The Visegrad countries have undertaken to coordinate a number of activities, including their economic relations,[33] their relations with other European institutions, and their security policies. However, there are serious tensions within the Visegrad group today, which raise doubts about the strength of these countries' desire to continue cooperating within this framework.

Aside from the regional tensions themselves, the Central and East European countries are suspicious of the EC's multilateral leanings. In particular, they fear the creation of a "Europe bis" in this region, a "new division in Europe, the creation of a zone protecting the Community from the the insecurity coming from the East, and that this Europe-bis [might] become something permanent as was the case of the past European historical developments".[34] The vanguard Visegrad countries have been especially disturbed to realize that the EC increasingly sees and prefers to deal with Central and Eastern Europe as an amorphous whole. The result is misunderstanding on both sides, despite the best intentions.

Although I would criticize the EC Member States for failing to ratify the Europe Agreements concluded nearly two years ago with the Visegrad countries, I believe that the multilateral approach is a sensible, if not an essential approach to the reorientation of Europe. Even under optimal economic circumstances, the EC could hardly provide a complete substitute for trade and political dialogue with neighbouring Central and East

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31 Commission Guidelines, *supra* note 11, at p. 6. *See also* Commission Enlargement Report, *supra* note 18, at p. 18.

32 Thus, the 21 September 1993 meeting between the EC Troika and the Foreign Ministers of the associated Central and East European countries was attended by representatives of all six countries that have concluded Europe Agreements with the EC to date (i.e. Bulgaria, the Czech Republic, Hungary, Poland, Romania, and the Slovak Republic).

33 For example, they concluded the Central European Free Trade Agreement (CEFTA), which purports to create equal conditions to those between the EC and the Visegrad countries. The CEFTA entered into force on 1 March 1993.

34 *Agence Europe: Together in Europe*, Nr. 9, p. 2 (15 May 92).

European countries. In addition, regional cooperation is likely to be a key to the political and economic stability that is prerequisite to full membership. It should console the Central and East European countries to know that the currently ongoing accession negotiations with Austria, Finland, Norway and Sweden "will, to the extent possible, be conducted in parallel, while dealing with each candidate on its own merit".[35]

C. Trade Liberalization

It can come as no surprise that the 1992 Visegrad Memorandum urged the EC to accelerate the economic integration foreseen by the Europe Agreements, emphasizing that "[o]pening markets to our products remains ... the most important and efficient way of assisting our countries". In particular, the Visegrad countries requested further asymmetrical trade concessions in all sectors, including the sensitive ones, as permitted by the agreements themselves. The December 1992 Commission Guidelines echoed their call for increasing the pace of liberalization and removal of obstacles to trade in the sensitive sectors.

In recognition of the crucial importance of trade in the transition to a market economy, the Copenhagen European Council agreed to accelerate the trade liberalization under the Europe Agreements. The Commission quickly prepared the different legal instruments to implement the trade concessions decided in principle in Copenhagen, and negotiated protocols to the Europe Agreements. The Council approved them and made them effective from 1 July 1993.[36] In essence, the effects of these changes are to accelerate the suppression of customs duties on sensitive industrial products and the increases in quotas and ceilings; to suppress duties on textile and steel products earlier than originally provided; and to accelerate reduction of levies or duties and to increase quotas in the agricultural sector.

Considering the difficult economic situation in the EC at this time, it is remarkable that any concessions have been obtained. It remains to be seen whether the associated countries will be satisfied with these improvements. It should be noted, however, that the Copenhagen European Council did not attempt to fashion any solution for the problems stemming from the EC's increasing use of trade protection measures against imports from Central and Eastern Europe.

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35 Copenhagen European Council, Conclusions of the Presidency, *Agence Europe Documents*, Nr. 1844/45, art. 4. p. 4 (24 June 1993).

36 Council Decision 93/421/EEC of 19 July 1993 on the provisional application of the Additional Protocols to the Interim Agreements on trade and trade-related matters between the EEC and the ECSC, of the one part, and certain third countries, of the other part, and to the Europe Agreements between the EC and their Member States and the same countries, OJ 1993 L 195/42; Council Regulations 2232-2235/93/EEC of 5 August 1993, OJ 1993 L 200.

D. Financial and Other Forms of Cooperation

Another area in which the Visegrad countries have sought further commitments from the EC is in regard to financial cooperation. The 1992 Visegrad Memorandum sought a substantial increase in aid and proposed that the EC's emphasis should shift from "more traditional technical assistance to greater support for investment". Aside from ongoing reforms of the PHARE and TACIS programs themselves, the Copenhagen European Council agreed to make further commitments in this field so that the assistance granted would be more effective. In particular, the EC will offer technical assistance to prepare and facilitate infrastructure improvements, as a complement to the decision made at the Edinburgh Summit to support the development of infrastructure networks.[37]

In addition to financial cooperation, the Copenhagen European Council addressed itself to two other forms of cooperation designed to further economic integration. First, the Copenhagen European Council invited the commission to make proposals before the end of 1993 to open up Communist programs to Central and East European countries, as foreseen in the Europe Agreements, and instructed the Commission to take as its point of departure those programs which are already open for participation by the EFTA countries.[38] Second, the Copenhagen European Council agreed to assist the associated countries in fulfilling their obligations to approximate their legislation to that of the EC. A task force will be established for this purpose, and training will be provided to officials from the associated countries.[39]

IV. Conclusion

The result of the Copenhagen European Summit has been well received, at least in Hungary. If the EC Member States complete the ratification process and thus cause the Europe Agreements to enter into effect, then I predict a period of relative harmony during which the associated countries get on with the business of transformation and approximation. Hungary for one will be consumed during the coming months with next year's election. Since there is a high degree of consensus here on the desirability of integration with the EC, the Europe Agreement is not likely to be a source of controversy during the campaign.

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37 The leading role in this context will be taken by the European Investment Bank, the European Bank for Reconstruction and Development and other international financial institutions, rather than the EC itself. Copenhagen European Council, Conclusions of the Presidency, *Agence Europe Documents*, Nr. 1844/45, annex II, point (iii) p. 12 (24 June 1993).

38 Copenhagen European Council, Conclusions of the Presidency, *Agence Europe Documents*, Nr. 1844/45, art. 7(A) (iv), p. 6 (24 June 1993).

39 Copenhagen European Council, Conclusions of the Presidency, *Agence Europe Documents*, Nr. 1844/45, art. 7(A) (iv), p. 6, and annex ii, point (iv), pp. 12–13 (24 June 1993).

The prevailing attitude, at least in Hungary, accepts that the relations with the EC are like a marriage after the honeymoon is over. Jean Monnet has been quoted as saying that close association means a destiny henceforth shared. It is a time for the associated countries to formulate strategic plans for developing this close association, and to get on with the work.

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European Economic Integration in the Framework of the EEA Treaty and its Impact on the Sovereignty of the EFTA Countries

On May 5, 1991, in Porto, Portugal the European Community (EC), the European Coal and Steel Community, their Member States and the Members of the European Free Trade Association (EFTA) signed an agreement on the establishment of the European Economic Area, hereinafter referred to as the EEA Agreement. The Agreement required alterations in the EFTA Agreement, and new institutions had to be established, such as the EFTA Court, the EFTA Surveillance Authority and The Standing Committee of EFTA. In addition, the jurisdiction of the EFTA Council had to be broadened. One consequence of the EEA Agreement was that EFTA as an organ had to be altered: instead of being a loosely structured organisation it would now have some aspects of a supranational international organisation.

The initiative for the establishment of the EEA was undertaken at a time when Europe was divided into two parts and the USSR was one of the two leading superpowers. The European States had organised their security policies along two alternative lines: the majority had chosen alliance, i.e. they had joined military organisations (NATO, Warsaw Pact). The alternative was neutrality; European states such as Sweden, Austria, Finland and permanently neutral Switzerland stayed outside the military alliances. The security policy of the latter nations was characterized by a cautious attitude towards the EEC, later the EC, which had been established by the Treaty of Rome.

Membership in the EEC and EC was considered inconsistent with a policy of neutrality. This was due in part to the fact that nearly all EC Member States were also members of NATO. The leading military power in Europe, the Soviet Union, regarded

the EC as an organisation which endorsed NATO policy and, in a sense, supported the alliance economically as well.

In the White Paper of 1985 and the Single European Act of 1986, the EC decided to strengthen integration with the aim of creating complete internal markets beginning in the year 1993. In those days, the natural states in Europe—with the exception of Ireland—could not consider membership in the EC. On the other hand, economic realities—both in the EFTA States and the EC—required an expansion of the internal market towards the EFTA States. It was anticipated that Western Europe would become a competitive market area counterbalancing the two economic superpowers, the USA and Japan. This created a serious problem of how to reconcile a policy of neutrality and, at the same time, an interest in the Common Market and integration. The solution was to sign a treaty which, on the one hand, could provide the freedom to develop the Common Market and its institutions but, on the other, would bind the EFTA countries to the Community Law.

The plan of closer co-operation between the EC and EFTA was first introduced by Jacques Delors in January 1989. As the division of Europe into two economic blocs (the EC and the socialist economic community SEV/COMECON) seemed firmly established, it was predicted that the EEA solution would become permanent. This was also the basis of the preparatory work of the EEA Agreement. However, the political situation in Europe changed extremely rapidly: the USSR ceased to exist; the two German States were unified; the Warsaw Pact and SEV were abolished. In the new political situation, the status of the neutral states with respect to economic integration within the EC was transformed. In spite of their officially declared policy of neutrality, the neutral EFTA States considered it possible to seek membership in the EC.

It seems to me that the EEA solution will be rather temporary. The EFTA States have begun negotiations with the EC. It is anticipated that the EEA Agreement will enter into force in 1993 and that the first EFTA State will become an EC member in 1995 or 1996. One of the uncertain factors of membership is the outcome of advisory referendums which will be organised in EFTA States seeking full membership. It is likely—at least in theory—that only some of the EFTA States will join the EC. If this is the result of the negotiations, those EFTA States will permanently construct their relationship with the EC on the basis of the EEA agreement.

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The negotiations on the EEA Treaty proved a long series of disappointments. The EFTA States wanted the EEA to be constituted as an organisation which would not possess any supranational authority and which would guarantee the sovereign rights of the EFTA States. As a result of the negotiations, an agreement was signed which was negative—in both a legal and political sense—where the protection of the sovereign decision-making powers of EFTA states was concerned.

The system created by the agreement is unique in the history of international organisations. The conventions are the most extensive in the history of international agreements. Also the EEA Treaty as an organisational structure is unique and very

complicated. For instance, it is uncertain whether the EEA can be regarded as an international organisation and a subject in international law.

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In the textbooks on international law, the concept "sovereignty" is at times divided into two sets of legal norms and customs. One may speak about the internal and external aspect of the sovereignty of a State. Internal sovereignty means territorial supremacy. Only the state organs of the state itself and its own officials can exercise authority within the territory of the state. The authority of the highest organs of a state is divided in constitutional law into the three branches: the Legislative, the Executive (Administrative) and the Judicial. Secondly, the external sovereignty refers to international legal (customary) norms, which determine the status of a state in the international context (e.g. the right of a state to form its own foreign policy and security policy, equality of states, and the right of a state to receive certain treatment in the community of states).

The Member States of the EC have significantly restricted both their external and internal sovereignty on behalf of the community organs by the Treaty of Rome and its supplements. The EC is occasionally characterised as a supranational organisation. When the EFTA States started negotiations with the EC, their point of departure was that they would not adapt themselves to the goals of the supranational use of power. Instead, they insisted on keeping their external and internal sovereignty unchanged. They also announced that they would not alter their constitutions because of the EEA Agreement.

The Finnish Constitution (Hallitusmuoto 1919) expressly ordains that Finland is a sovereign republic, with legislative power belonging to the Parliament, executive power to the President of Republic and the government together and, finally, judicial power to the independent courts. These statutes are interpreted literally. The transfer of powers to a foreign state or international organisation is unconstitutional. By contrast, in the constitutions of the other Nordic EFTA countries, there are provisions which give the parliament power to transfer power of the state organs by special majority (3/4, 4/5 and 5/6) or by amendments to the constitution. In the Swedish Constitution (regeringsform 10:5), the "delegation" or transfer of public powers to a supranational organisation is permitted only with the support of a 5/6 majority in Parliament or through the procedure for the amendment of the Constitution. Minor transfers of power are allowed by a 4/5 majority, as happened in the case of the EEA Agreement. In Norway, corresponding transfer of power require a 3/4 majority (Constitution, paragraph 93).

The EFTA States began their negotiations with the EC on the basis of organisational equality. The EFTA States thought the EEA Agreement would be based on the principle of equality; the preparatory work of new legislation for the economic area would be carried out by common organs. The implementation of the norms would be secured by joint legal bodies, mainly by a special court inside the EC Court. The EEA Court was planned to include judges from the EC Court and the EFTA countries. Subsequently, the EC Court rejected this plan as being contradictory to the Treaty of Rome.

The final Agreement did not fulfil the aims of the EFTA States, especially concerning their possibilities to join the preparatory work of new legal norms for the EEA and to have a joint EEA court. The EEA Agreement consist of several actual and some legally significant restrictions on internal sovereignty.

In the following sections, I shall deal with these restrictions of sovereignty in rather broad terms[1].

1. The Supremacy of EC Law

Some of the Member States of the EC officially apply the so-called dualistic and some the monistic system. In this context, dualism means that an international provision (legal obligation) laid down in a treaty or a decision of an international organisation has to be transformed by a separate legislative act as a part of the internal legal system (transformation/incorporation). In a state which applies the dualistic principle it might happen that, despite the state's having signed an international treaty, its parliament will reject the act transforming the treaty obligations. This would then mean that the courts of law and the administrative bodies are compelled to apply domestic legislation instead of the treaty obligations where norms conflict.

In a monistic system without national legislation, an international obligation is applicable law in national courts and governmental bodies. International obligations are part of the law of the land and directly applicable.

Although some of the EC Member States apply dualism and some monism, the Treaty of Rome and EC Court practice have actually instituted a monistic system in all the EC States. As is widely known, this occurs in two ways: firstly, the Regulations by Art. 189 of the Treaty of Rome are directly applicable in every Member State regardless of its constitutional provisions. Secondly, the EC court has developed some principles which give the directives direct effect and direct applicability if these directives fulfil certain criteria. The Member States are not allowed to try to avoid the legal effect of a directive by appealing to the uncompleted entry into force (transformation) of a directive. In a conflict between an internal legal norm (even a norm on the constitutional level) and a directive with direct effect, the directive prevails.

Some EFTA States represent a dualistic, some a monistic system. During the treaty negotiations, the EC suspected that the Nordic Countries (Iceland, Sweden, Norway and Finland), when using a dualistic system, could avoid the legally binding force of certain legal obligations in the EEA Agreement, directives and regulations mentioned in the EEA Agreement, its protocols and Annexes. The basis for this doubt may have been certain negative experiences previously in implementing EC law by certain reluctant EC States. Of the EC Members, Germany and Italy officially use the dualistic system (and Great

1 Unfortunately I have had for the present only limited possibilities to follow the developments in Iceland. I therefore concentrate on the constitutional debate in Finland, Norway and Sweden.

Britain de facto). For a long time they were reluctant to recognise the direct effect of EC Law and the supremacy of EC Law with respect to national legislation.

Two EFTA States, Austria and Switzerland, employ the monistic system. International law and all the legal obligations of the EEA Agreement are directly in force and valid without any acts in these countries. Because of the Nordic systems, the EC claimed that the EEA Agreement should contain arrangements which guarantee that the Nordic Countries obey EEA provisions in the same way as the EC Member States. This was fulfilled by Protocol 35 of the EEA Agreement. According to the ingress of protocol 35, no party to the agreement is required to transfer legislative powers to the bodies of the EC; full legislative sovereignty is thus recognised. On the other hand, according to the only operative article of the Protocol 35, the EFTA States commit themselves to enact legislation against a possibility of conflict of EEA norms with the internal legislation of an EFTA state.

The EFTA States committed themselves to the creation of a system in which EEA norms would have priority over national legislation in the case of conflict. If a particular EEA norm (EEA Treaty norms and future normative decisions of the EEA Joint Committee) should differ from previously enacted norms or the norm has been enacted after it, the EEA norm shall prevail over a national act. This obligation did not, in fact, apply to Austria because of its monistic system.

All of the Nordic Countries enacted a single act by which the entire EEA Agreement—with the Protocols, Annexes and Acts (EC Regulations and Directives) referred to—was incorporated or transformed. Incorporation means the procedure by which the Parliament declares certain treaty obligations valid and binding in courts and governmental bodies. The method of incorporation was used in the cases of EC regulations mentioned in the Annexes of the EEA Agreement.

The EC directives were transformed in national legislation by separate legislative acts: the norms which were part of EC directives were rewritten and enacted by the Nordic Parliaments.

In some Nordic Countries, incorporation covered all the parts of the EEA Agreement, while in others it included only the parts of the agreement which required legislative acts. For example, Sweden only incorporated legislation regulating relations between states, leaving out those with national effect.

Sweden fulfilled the obligations set out in Protocol 35 according to the principle of "selection of law" (lagval). If there is a conflict of norms between ordinary national legislation and EEA legislation, Swedish courts of law are obliged to apply the EEA legislation. However, if a collision of norms appears on the constitutional level (i.e. an EEA rule conflicts with the Swedish Constitution), the provision of the Constitution will not be put aside. The Swedish Parliament, Riksdag, was of the opinion, that the principle of "selection of law"(lagval) does not conflict with its legislative sovereignty. There were differing views, however. The High Court in Skåne and Blekinge and the authoritative organ of experts (the legislative council, lagrådet) took the opposite stance: the principle restricted the sovereign legislative power of the Parliament. The council suggested that the principle of the selection of law should be removed from the law that

transformed the legal norms of the EEA Agreement as part of the legislation of Sweden. The Government's view was that the principle of the selection of law could not be avoided because of the binding character of Protocol 35.

In Finland, Iceland, and Norway, the obligations set out in Protocol 35 of the EEA Agreement was fulfilled in a stricter way than in Sweden. Finland and Norway enacted provisions by which the EEA norms—including the normative decisions of the Joint Committee—prevailed over or put aside domestic legislation in all cases of conflict except those involving the constitution.

Because of its restrictive influence on the legislative power of the Parliament and the President of the Republic—and thus on their sovereignty—the act was regarded in Finland as conflicting with the Constitution; this did not, however, lead to amendment of the Constitution. During the negotiations Finland had announced that the incorporation of EEA Agreement would be carried out without any amendments to the Constitution. The Finnish Constitution specifies a procedure for this kind of situation; if there occurs a conflict with the Constitution, it can be avoided by statute if the statute is passed by a two-thirds majority. This voting procedure was used in the transformation of Protocol 35.

In Iceland and Norway the principle of the priority of EEA norm was not considered unconstitutional.

2. *The Assessment of the Amendments of National Legislation by the EEA Joint Committee*

Article 97 of the EEA Agreement stipulates: This Agreement does not prejudge the right for each Contracting Party to amend, without prejudice to the principle of non-discrimination and after having informed the other Contracting Parties, its internal legislation in the areas covered by the Agreement:

— if the EEA Joint Committee concludes that the legislation as amended does not affect the good functioning of the Agreement or

— if the procedures referred to in Art. 98 have been completed.

Particularly in Sweden it was anticipated that Art. 97 (EEA) would restrict the sovereign legislative power of an EFTA State. It was suspected that the Joint Committee would get a veto right against amendments of national legislation. This point of view was not widely accepted in any of the Nordic Countries; Art. 97 (EEA) was not regarded as meaning a legislative veto right. The fundamental justification of this in Sweden was that decisions in the EEA Joint Committee are made unanimously. Where one of the parties (EC/EFTA) is opposed to the decision of the EEA Joint Committee, it could prevent it from concluding that a piece of Swedish legislation does not affect the good functioning of the Agreement. Individual EFTA States formulate their opinions, which are then presented to the EFTA Standing Committee. The Committee applies the principle of consensus: if any of the EFTA States presents a dissenting opinion, the committee is not allowed to make a decision.

According to the Swedish interpretation, the EEA Joint Committee cannot achieve a legislative right of veto against the amendments in the Swedish national legislation, because Sweden can prevent in the EFTA Standing Committee making a decision which would result in statutes enacted by the Swedish Parliament to be against the EEA provisions.

In Finland and Norway the government bills for the incorporation of the EEA Agreement stated that the Parliament may enact a statute which is contrary to an EEA Provision. In the same context, the governments stated that this would mean an international delict and lead eventually to the use of sanctions against the State. This kind of procedure can also lead to the use of the Safeguard Measures laid down in Art. 111 (EEA).

The actual meaning of Art. 97 is rather unclear.

3. The Entry into Force of the EC Law and its Amendments in the EFTA States

The fundamental objective of the EEA Agreement is to bring into force in the EFTA States the main part of the primary and secondary legislation approved by the EC Council and Commission during the last thirty years. Provisions introduced in the Treaty of Rome, EC Regulations, Directives and Decisions concerning the Four Freedoms will be put into force and implemented in the EFTA States. These four freedoms are the freedom of goods, the freedom of persons, the freedom of services and the freedom of capital.

The norms developed before the signing of the EEA Agreement on 2 May 1991 will enter into force partly through incorporation and partly through transformation. As mentioned above, the EEA Agreement consists of the Main Agreement, Protocols and Annexes (EC Regulations, Directives and Decisions). They will not enter into force nationally in the EFTA States until the EEA Agreement has been ratified by the Contracting Parties.

Not all the relevant rules were rewritten as parts of national legislation. This was necessary expecially because of the EC Regulations referred to in the Annexes. For the EC, Regulations are directly binding law in the EC area. The Community required, for securing the homogeneity of EEA legal system, that dualistic EFTA States could not begin to enact national statutes related to the Regulations. Instead, the Directives were transformed.

The EEA Joint Committee may decide on the amendments to the norms in the EEA Agreement. These decisions are regarded as international agreements and are to be transformed and accepted by EFTA parliaments. This procedure does not formally restrict the sovereign legislative powers of EFTA States. Amendments to the EEA Agreement and entirely new rules (new EC Regulations and Directives) will be decided by the procedure of Treaty and by ratification. In other words these have to be implemented by the national legislative organs in the form of specific laws and decrees. According to Art. 102 of the EEA Agreement, if the decision of the EEA Joint Committee requires

incorporation or transformation by the decisions of a legislative organ, this shall be notified to the EEA Joint Committee. The new norm or the amendment of a valid norm enters into force only when the parties have notified that constitutional requirements have been fulfilled. In a negative case—if, e.g., an EFTA parliament rejects the bill—this particular EEA rule will be provisionally suspended.

The EEA system formally guarantees the legislative sovereignty of all the Contracting Parties. In practice, the reality is different. The Community Law (aquis communautaire) has been developed gradually over the decades via decisions on the Regulations and Directives, the Preliminary Rulings and other decisions of the EC Court. When the EEA Agreement enters into force in the EFTA States, with the exception of Switzerland, the states are obliged to put into force a vast number of norms (aquis) by a single decision; the members of the Community have had several decades time. However, the EFTA States had no alternative. They had to put into force the major part of the community law by a single parliamentary decision (hundreds of acts for bringing them into force). Actually the EEA Agreement meant a very radical interference in the legislative sovereignty of parliament in an EFTA State. There were only two alternatives: either to secure the legislative sovereignty and pay the price of remaining outside of the EEA system and the internal markets or to approve, without any real reservations and amendments, the legal norms which the EC had decided were required for fulfilling the Four Freedoms.

In the early phase of the negotiations concerning the Agreement, the EFTA States presumed they would gain a position equal to that of the EC States in negotiating new EEA Rules and participating in the work of drafting committees. This aim had to be abandoned because of the resistance of the EC. As a result, the EFTA States may send experts to participate in the work of committees only as observers. Thus it is hardly conceivable that the EFTA States will have any significant role in creation of new EEA Rules.

On the other hand, one may agree that the EC cannot accept a situation in which the EFTA states could seriously influence the norm-drafting work carried out in the interest of the Community.

4. Arbitration

The EEA Agreement provides for arbitration. The arbitration award is decided by the majority and the award has a binding effect, i.e. an EFTA State is legally obliged to implement the decision. If any Contracting Party finds that measures carried out by another party violate its economic benefits and are against the EEA Rules, it may take appropriate measures, which otherwise would be contrary to the treaty obligations. These are called Safeguard Measures. If a safeguard measure taken by a Contracting Party creates an imbalance between rights and the obligations, any other Contracting Party, as a target of safeguard measures, may take rebalancing measures. Solutions to such conflicts can be achieved through arbitration. At least two of the arbitrators will be

represent the parties and one must be impartial. The decision of the arbitration, i.e. the award, is made by the majority and the parties to the dispute are obliged to obey it. The award may mean, for example, that a party must give up the safeguard or the balancing measures and amend its legislation. Arbitration was found therefore to be against the Finnish Constitution in that it restricted both internal sovereignty and, to some extent, external. In Iceland, Sweden and Norway, this system was not deemed to be contrary to the constitution. The Swedish Constitution stipulates only that the public power must derive from the people (Regeringsform 1 §). In Finland the principle of sovereignty is written into the constitution.

5. Sovereignty and the Use of Judicial Power

According to Art. 6 (EEA), the EFTA States are bound to obey the relevant rulings made by the EC Court of justice prior to the date of signature of the Agreement (2 May 1992). The provisions of the EEA Agreement which are identical in substance to corresponding rules of EC Law serve as the basis of their interpretation. In other words, the courts and the civil servants in the EFTA States are bound to apply the interpretations of Community Law in the decisions of the EC Court when interpreting EEA rules.

Article 6 (EEA) can be seen as a restriction of the decision-making power of the Nordic countries. The Finnish Constitution (Hallitusmuoto 2nd paragraph) gives the judicial power in Finland to the independent courts. Prior to the EEA Agreement, the Finnish courts were not obliged to comply with any rules or decisions other than laws and administrative acts. In Nordic judiciary practice, not even the prejudicative decisions made by the Supreme Court have legally binding force: district courts enjoy total independence in their work. Article 6 (EEA) plus the principle of the Supremacy of the EEA Law meant a significant interference in the sovereign judicial decision-making power.

6. The Binding Precedents of the EC Court of Justice

According to Protocol 34 of the EEA Agreement, an EFTA State may assert the right of its courts and tribunals to request the EC Court of Justice to give a binding decision on the interpretation of a single EEA rule. The obvious objective of the EC was to ensure that the EFTA States would approve the system of Preliminary Rulings laid down in Art. 177 (3) in the Treaty of Rome.

A commitment to take into consideration the binding interpretations of a non-national court would have meant severe interference in judicial sovereignty, and the EFTA States accordingly decided to deny the EC Court the right to give binding interpretations of EEA Rules. The Finnish Constitutional Committee, in particular, considered that recognising such a power would be unconstitutional. In the future, the Government cannot recognise such a right without a decision of Parliament.

Still, the EC Court Decisions may have in the future have both direct and indirect influence on the decision-making of the courts in the EFTA countries. As mentioned before, decisions of the EC Court given prior to the signature of the EEA Agreement are binding on courts and tribunals in the EFTA States. Article 3 (EEA) contains rules about the indirect binding effect of decisions made after the signing. The Contracting Parties have promised to take all appropriate measures to ensure the fulfillment of the provisions of the Agreement. Moreover, the Parties have committed themselves to refrain from any measure which could jeopardize the attainment of the objectives of the Agreement. This is called the principle of loyalty. It can be considered an obligation on the part of EFTA States to take into account EC Court Decisions which have been handed down after the signing of the Agreement and which are connected with it.

The second form of indirect binding effect concerns the EFTA Court; it has to take into account in its work the entire (even future) case law of the EC Court. It is possible that precedents made by the EC Court will be filtered into the legal systems of the EFTA States through the decisions of the EFTA Court.

7. The Advisory Opinions of the EFTA Court of Justice

According to Art. 34 of the Agreement of the EFTA States on the establishment of a surveillance authority and a court of justice, the interpretation of the EEA Agreement. A national court may freely 34, it is possible for an EFTA State to restrict the right to request advisory opinions from the EFTA court solely to the supreme courts of the EFTA States. In the Nordic countries, however, this jurisdiction has been granted to all national courts and tribunals. Because the decisions are advisory in nature, they are not considered direct legal interference in the EFTA States as sovereign users of legislative power. It is, however, highly unlikely that national courts will disregard such opinions even if formally they have freely and independently decided whether or not to request an interpretation.

8. The Decision-Making Power of the EFTA Supervisory Authority, the EC Commission and the EFTA Court

The European Community insisted that an efficient control system had to be established for ensuring the efficiency of the EEA system and the loyal application of its rules. The EFTA organisation had to be supplemented by organs using supranational decision-making authority, and, accordingly, a control organ on jurisdiction was established which was equivalent to the EC Commission. In particular, this body monitors the rules on the freedom of competition in EFTA states. It may perform inspections in enterprises and industrial plants in EFTA countries. If it observes infringements of the Agreement, the Surveillance Authority has a right to impose fines. Also, the EC Commission has equivalent jurisdiction in the European Economic Area. In all the Nordic Countries this jurisdiction was considered delegation of a part of the administrative and judicial

decision-making power. In Finland it was deemed unconstitutional. By contrast, Sweden incorporated the rule of jurisdiction in accordance with its Constitution by a 4/5 majority in Parliament. Sweden took similar action with the approval of the right of control and right of imposing fines.

Norway had difficulties with the EEA Agreement on this point. According to Paragraph 93 of the Norwegian Constitution, Parliament can delegate judicial and administrative powers only to international bodies of which Norway is a member. The EC Commission could impose fines on Norwegian companies operating within the territory of Norway; this possibility was considered contrary to Article 93 of the Norwegian Constitution. Norway accordingly informed the other contracting parties that it could not guarantee that the decisions of the Commission would follow developments in Norway and, if necessary, start discussions with Norway if difficulties should arise.

A court also had to be established which would possess supranational judicial authority. This need became obvious after the decision of the EC Court in which the desire of EFTA States to create a common court for the EC Member States and EFTA States was abandoned.

The EFTA States established a court composed of seven judges. The judges are chosen from persons whose independence from the native country is beyond doubt. The EFTA Court acquired considerable supranational judicial power. The EFTA Court also has jurisdiction in actions brought by an EFTA State against a decision of the EFTA Surveillance Authority. In addition, it has jurisdiction in actions concerning the settlement of disputes between two or more EFTA States. Finally, it may impose penalties which have a binding effect on the EFTA States and their enterprises.

* * *

As is emphasised several times in the EEA Agreement and its ingresses, the arrangement has no restricting effect on the sovereign decision-making power of national organs of the Contracting Parties. Thus the ingress of the Main Agreement of the EEA acknowledges the independence of the courts and stresses that the Agreement will not restrict autonomy in decision-making. In the preamble of Protocol 35 it is said that the European Economic Area will be created without requiring any of the Contracting Parties to transfer legislative power to an institution of the EEA.

In spite of this, it is widely thought in the EFTA States that the EEA will restrict the sovereignty of particular EFTA States considerably in all of the three areas of state powers—but in a covert, subtle way. Especially in Finland public opinion has been that several parts of the complex agreement affect sovereignty and therefore are contrary to the Constitution. Sweden and Norway solved the problem by applying a constitutional rule of the right to transfer administrative and judicial jurisdiction to the organs of an international organization by a majority of 4/5 and 3/4, respectively.

Norway and Sweden did not alter their constitutions. In Finland a constitutional change may be effected. Finland will follow the example of Denmark. A special

committee in Parliament will act on behalf of Parliament and give preliminary decisions—political, not legally binding—on draft-decisions of the Joint Committee of the EEA.

The position of the EFTA States as the Contracting Parties to the EEA Agreement has occasionally been compared with eventual EC membership from the point of view of sovereignty. It seems to me that the sovereignty of an EFTA State shall be more restricted in the EEA than the sovereignty of the members of the EC according to the Treaty of Rome. A Member State of the Community is represented in the Council of Europe, in the EC Council, the EC Commission, the EC Court, the EC Parliament and all the EC preparatory committees and other organs. Furthermore, a member can play a part in drafting new EC legislation right from the beginning and participate in the formulation of the Court Decisions. In the EEA system, an EFTA State is isolated. The EEA Joint Committee may become a one-sided—rather than an interactive—legislative organ; possibilities to join in the decision-making are slight. The functioning of the EEA Joint Committee may develop to translate and transform the EC Law as a part of EEA system. The EFTA States cannot substantially influence the content of new regulations and directives during the preparation in the committees of EC Council and Commission. I doubt if any norms will be drafted by EFTA. EFTA is hardly able to prepare amendments independently which then would be implemented in the European Community by the EEA Joint Committee.

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The Special Place of the Rights of Minorities in the International Regime of Human Rights

1. In 1945 the Institution of International Minority Law, which had a long history came to exist *in statu morendi* by that time, appeared to have lost its place in the new international legal order emerging with the adoption of the United Nations Charter. This assumption and the fact that international minority rights were consequently stated to exist no more[1] were due to various reasons, the decisive one being that the spread and effective operation of the international protection of human rights as well as of the idea of democracy not only made it superfluous *per se* to accord a special status to national, ethnic, linguistic and religious minorities,[2] but were also inconsistent with it on the ground of the different philosophical motives behind them.[3]

2. The protection of minorities through the recognition of general human rights[4] has proved to be an illusion, however. A considerable part of minorities

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1 Study of the legal validity of the undertakings concerning minorities. UN. doc. E/CN. 4/367 and Add. 1 (1950). For critical remarks on this Report, see KUNCZ, J.: The Present Status of the International Law for the Protection of Minorities, 48 AJIL (1954), p. 284; SOHN. L. B.: The Rights of Minorities. in: HENKIN, L. (ed.): The Covenant on Civil and Political Rights (New York, 1981), p. 271.

2 DEMICHEL, A.: L'èvolution de la protection des minoritès depuis 1945, R.G.D.I.P., 1960, pp. 27–28; TOMUSCHAT, Ch.: Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights, in: Festschrift für Herman Mosler (Springer Verlag, 1983, p. 949; more recently CULLEN, R.: Human Rights Quandary, Foreign Affairs (Winter 1992/93), pp. 79–88.

3 See 1950 Study (supra, No. 1), Chapter XIV.

4 It relied on the presumption that "... la suppression de l'oppression individuelle ètant considerèe, comme fuffisante pour amenez la cessation de l'oppression collective". BOKATOLA, Isse Omanga: La déclaration des Nations Unies sur les droits des personnes appartenant a des minoritês nationales ou êthniques, rèligieuses et linguistiques, R.G.D.I.P. 1993. pp. 750–751.

survived[5], and their existence carried in it the possibility of national and international conflicts. Therefore it can in no way be seen to be an accident that international minority law as a phoenix has risen again from its ashes, *contra legem* in some measure.[6]

3. The Soviet Union was among the States which proposed the inclusion of minority rights in the Universal Declaration of Human Rights,[7] although it hardly fitted into its political philosophy and system.[8] Despite its failure that attempt opened the way to the study of minority problems and the preparation of draft texts by the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities,[9] an organ of the Commission on Human Rights. As early as 1953 the recognition of certain rights for persons belonging to ethnic, religious or linguistic minorities was present in the wording of the International Covenant on Civil and Political Rights, which was in the making.[10] Thus the international minority law was clearly resuscitated in the international regime of human rights. In this context the past decades have witnessed a multiplication of international treaties on the protection of minorities as well as of international texts of legal import and texts devoid of such import.[11]

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5 CAPOTORTI, F.: Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities. UN doc. E/CN. 4/Sub. 2./384/Rev. 1. 1979. Annex III; DEMICHEL: op. cit. No. 2. p. 28; ERMACORA, F.: The Protection of Minorities before the United Nations, RCADI, vol. 182 (1983–IV), p. 346.

6 THORNBERRY, P.: Is There a Phoenix in the Ashes? International Law and Minority Rights, Texas Internatioanl Law Journal, No. 15. 1980. pp. 421–458.

7 For the background, see Yearbook of the United Nations, 1948/49. pp. 543–545. In view of the close relationship between the Declaration and the European Convention on Human Rights (COHEN-JONATHAN, G.: La convention européenne des droits de l'homme Paris, 1989. pp. 11–12, the latter is also limited to providing for non-discrimination and the precondition.

8 The totalitarian political and state system called socialist (for the latter's criteria see KELSEN, H.: General Theory of Law and State, Cambridge (Mass.), 1949. pp. 283–308), notably the dictatorship of the proletariat "... is a power not bound by any law whatever (LENIN: A proletárforradalom és a renegát Kautsky (The Proletarian Revolution and Renegate Kautsky), Lenin Összes Művei (Complete Works of Lenin), Vol. 37 (2nd Edition), Budapest, 1973. p. 232), which, representing at the same time the entire community of the State and society, is able to unify individual, group and all-social interests (FÖLDESI, T.: Emberi jogok (Human Rights), Budapest, 1989. pp. 13 and 36), which as a monolithic concept *a priori* deems otherness to be an enemy (ibid.). It refuses to accept national movements of this "otherness" as manifestations of particularism (LENIN: A nemzetiségi politika kérdéseihez (To Questions of Nationality Policy), Lenin Összes Művei (Complete Works of Lenin), Vol. 25 (2nd Edition), Budapest, 1970. p. 71), while it subordinates *expressis verbis* any support to the itnerests of the proletarian revolution LENIN: A nemzetek önrendelkezési jogáról (On the Nations' Right to Self-Determination), ibid., p. 273.

9 ECOSOC Official Records, Ninth Session, Supplement 10, para. 13. Quoted by CAPOTORI, op. cit. No. 5. p. 28.

10 Yearbook of the United Nations 1953, p. 383.

11 For instance, International Covenant on Civil and Political Rights, Art. 27; UNGA Res. 47/135 (18 December 1992): Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; 1960 UNESCO Convention against Discrimination in Education; 1965 UN Convention on the Elimination of All Forms of Racial Discrimination; 1989 UN Convention on the Rights of the Child; 1989 ILO Indigenous and Tribal Peoples Convention; Final Act of the CSCE (Helsinki, 1975), Principle VII (Respect for Human Rights and Fundamental Freedoms); and Copenhagen's (1990) and Geneva's (1991) documents; and finally CSCE High Commissioner on National Minorities (1992).

Since the international protection of human rights and minorities varies not only by philosophical approach,[12] but also by its practical consequences, regarding to very different situations of minorities in the various countries and of the territorial States' on unjustified fear of threats to their integrity, or possibilities of interference, particularly where the minorities have ethnic links with foreign States,[13] there is reason for asking *whether the rights of minorities are harmoniously framed in the international regime of general human rights or, on the contrary, their place in it is ambivalent.*

4. The insertion of minority rights in the international regime of human rights shows, *prima facie,* a few surprising features. Given the limitations of space, this study cannot but draw a few summary conclusions without explaining the arguments.

4.1. In accordance with the individual approach to human rights, with the ethos of respect for the individual, the persons belonging to minorities are the subjects of minority rights as well. While this approach may ensure the individual's freedom of choice or decision concerning their membership in a particular minority group, one should not forget that "a minority is not simply the totality of persons possessing individual rights, but a community whose members are bound together by close ties".[14] The so-called minority rights are of a peculiar nature, obviously meaning individual rights to be enjoyed in community with the other members of the group. However, this usual statement implies also a certain extent of *capitis deminutio,* for there is uncertainty as to the measure in which these rights can be exercised or are recognized outside a particular minority group.

4.2. Human rights are inalienable as they derive from the inherent dignity of the human person.[15] This axiom is hardly applicable to minority rights, the genesis and exercise of which are essentially conditional on recognition by the territorial State of the existence of such minorities,[16] which is not always the case.[17] This situation cannot be explained solely by the lack of a generally accepted definition of minority or the distortion of facts so common in international practice.[18] In the last analysis, as is rightly stated by Géza Herczegh, acceptance of minority rights depends on the political

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12 Supra, No. 3 and 4.

13 CAPOTORTI: op. cit. Nos. 5. p. IV.

14 HERCZEGH, Géza: A kisebbségek nemzetközi jogi védelme a mai Európában (The Protection of Minorities by International Law in Present-Day Europe). Emlékkönyv Dr. KEMENES Béla egyetemi tanár 65. születésnapjára (Book published in honour of University Professor Dr. Béla Kemenes on the occasion of his 65th birthday), Acta iur. et. pol., Szeged, Tom. XL. III. Fasc. 1–43, p. 146.

15 See Preamble of the International Covenant on Civil and Political Rights (1966).

16 CAPOTORTI: op. cit. No. 5. paras. 61 and 203. He nevertheless notes that the objective criteria are not negligible para. 204.

17 Best known is the consistent official attitude of France: Dècret no. 81–76 du 29 janvier 1981 portant publication du Pacte international relatif aux droits civils et politiques; Dècret no. 90. 917 du 8 oct. 1990 portant publication de la convention relatif aux droits de l'enfant. Report of the Human Rights Committee (GADR 38the session, A/38/40, para. 334. p. 78). For further examples, see CAPOTORTI: op. cit. No. 5. paras. 66–69.

18 LACHARRIERE, G. de: La politique juridique extèrieur. Paris, 1983. p. 115.

will of a given State, which is indicative of its attitude to the minorities living in its territory, namely on "whether it (that State) recognizes their existence and regards their survival as a value to be preserved or, quite the contrary, it endeavours to homogenize its population in keeping with the long-standing prejudices..."[19]

4.3. International legislation itself is permeated with ambivalence manifested in the acceptance of the existence of minorities. While it is a standing duty of States to respect and ensure human rights and to take the necessary steps to give effect to them (Art. 2 of the International Covenant on Civil and Political Rights), this duty with regard to minority rights is a *non facere obligatio,* at least within the meaning of Covenant Article 27, which even reflects an uncertainty about the purpose of minority protection. For example, Fawcett considers that a minority has only two options, namely integration (gradual assimilation, loss of identity as a minority) or separation.[20] Since the possibility of seccession[21] is ruled out by the international law in force, that law would merely afford temporary or transitory protection for minorities.

4.4. The development of international law has partially remedied this unfavourable situation by strengthening the minimum rights of minorities, notably the linguistic, cultural and religious rights, on the one hand and by widening their scope on the other: in the Declaration of 1992, for instance, international law has come to recognize the existence of minorities and their right to preserve their identities as well as to accept a certain obligation to take related measures, which implies a tacit acceptance of certain collective rights, but it has failed to define the nature and scope of the latter rights.

4.5. Existence of democracy, a constitutional State in the territorial country is a fundamental guarantee, a *conditio sine qua non* for the enjoyment of minority rights as well. At the same time, the covenant of 1966 regards the right to self-determination (Art. 1) as the touchstone of all human rights. As the peoples' right to self-determination implies full freedom of determination, the question inevitably arises whether prevention of the emergence of totalitarian, fascist regimes by free and earnest expression of the popular will is a conclusive presumption (*presumptio iuris et de iure*).[22]

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19 HERCZEGH: op. cit. No. 14. p. 153.

20 FAWCETT, J.: The International Protection of Minorities, Minority Rights Group, Report No. 41. London, 1979. pp. 4–6.

21 For the situation since the Aland Islands case, see Report presented to the Council of the League by the Commission of Rapporteurs, League of Nations, Doc. B. 7. 21/68/106 1921, p. 27, quoted by HANNUM, H.: Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights, Philadelphia, 1990. p. 29.

22 UNCIO, Vol. VI. p. 445, quoted by CASSESE, A.: Political Self-Determination—Old Concepts and New Developments, in: UN Law/Fundamental Rights. Two Topics in International Law (CASSESE, A. (ed.) (Alphen van den Rijn, 1979, p. 138). This premise is reflected in, e.g., The Agreement on a Comprehensive Political Settlement of the Cambodia Conflict (Paris, 23 October 1991). In this context see ISOART, P.: L'Organisation des Nations Unies et le Cambodge, R.G.D.I.P., 1993, pp. 668–670.

4.6. The possibility of restricting human rights is similarly accepted by the *de iure conditio* rules of international law.[23] Minority rights may also be restricted on another legal ground. Minority rights may also be restricted on another legal ground. As is stated *expressis verbis* in the Declaration of 1992, "Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States" (para. 4 of Art. 8).

This prohibition, marking as it does a retrogression from the earlier formulas,[24] refers to the most sensitive aspect of the international minority regime. While the obligations undertaken to recognize and ensure human rights belong in the category of parallel obligations,[25] there may be States, particularly in the case of national minorities, which are directly concerned and may have a "legal right or interest".[26]

Such a State may challenge the official attitude of the territorial State to the existence of minorities, its one-sided classification, which may be in conflict with the maxim of *res ipsa loquitur*,[27] and may take action against violations of minority rights. The latter possibility may even be supported by a historical precedent. The safeguards regime of the League of Nations' minority system allowed certain members of the Council (and them only!) to respond to grievances of minorities, in addition to action which the three-member Minoritiees Committee was empowered to take in cases involving a public interest[28] such response being presumably equivalent to protection of the individual interests of the States concerned.[29] It is part of the truth and should therefore be added that the prevailing regime of minority protection has not yet reached this stage as there is no generally accepted definition of the State injured by an internationally wrongful act.[30] Recognition of the legal interests of other States would be the more important

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23 BURGENTHAL, T.: To Respect and to Ensure: State Obligations and Permissible Derogation, and KISS, A. Ch.: Permissible Limitations on Rights, in: HENKIN: op. cit. No. 1. pp. 72–91 and 290–310.

24 BOKATALA: op. cit. (No. 4), pp. 759–760. The 1975 Final Act of CSCE is more satisfactory in this respect. See BRUHÁCS, J.: A kisebbségek nemzetközi jogi védelme és a helsinki folyamat (The Protection of Minorities under International Law and the Helsinki Process), Jogász Szövetségi Értekezések, 1989. Vol. XII. No. 2. pp. 73–76.

25 For the notion of parallel obligations, see FITZMAURICE, G.: The General Principles of International Law Considered from the Standpoint of the Rule of Law, RCADI, 1975–II. Vol. 92. pp. 125–126.

26 South-West Africa case (Second phase), according to the formula of I.C.J. reports 1966, para. 14. There may also be a directly injured State beside a general interest in upholding minority rights, as was pointed out by, e.g., UCHAKOV, who, for that matter, argued for a restrictive interpretation of the notion of injured State (Ann. de la Comm. du droit int., 1984. Vol. I. p. 283).

27 By analogy with the Columbian–Peruvian Asylum Case, I.C.J. Reports 1950, p. 274.

28 The relevant decisions of the Council of the League of Nations are reproduced in CAPOTORTI: op. cit., paras. 118–121. For an analysis thereof, see BUZA, L.: A kisebbségek jogi helyzete (The Legal Status of Minorities), Budapest, 1930, pp. 152–249.

29 It follows from, *inter alia*, the rule of incompatibility. See *Desicion of 10 June 1925* (Journal Off., VI., annèe 1925. pp. 878–879.

30 See *Draft articles on State responsibilitiy*, Part Two, Art. 5. Yearbook ILC, 1989. Vol. II. Part Two, para. 302.

since the mechanism devised for submission by individuals of grievances arising out of the individual interpretation of minority rights fails to operate in a satisfactory manner,[31] and today it would be too early to form any judgement of the activity of the High Commissioner for Minority Rights.

4.7. The primary source of international obligations concerning the protection of minorities is indisputably consituted by the various international treaties on human rights, and the question of whether the generally recognized rules of international law contain any provisions to this effect is not misplaced in view of the principle of *res inter alios acta nec nocere nec prodesse potest.*

— The International Law Commission (ILC) has already considered taking up the subject of codification of international minority law.[32] Indeed, there is mounting evidence in support of the fact that today even general international law requires a certain measure of minority protection.

— Participation in the physical and biological destruction of minorities gives rise not only to the criminal responsibility of offenders under the Convention of 1948 on the Prevention and Punishment of Genocide, but also to the international responsibility of the State for its internationally wrongful act, provided that the offender's conduct can be attributed to the State. According to the ILC draft articles on State responsibility,[33] "on the basis of the rules of international law in force, an international crime (of State) may result from ... (c) a serious breach on a widespread scale of (the) international obligation prohibiting, *inter alia,* genocide" (para. 3 of Art. 19). The only question that may be asked is whether the pertinent facts of an act of genocide committed by a natural person or a State are necessarily identical.[34]

The continuing study of the subject of minority protection and the further work of the Subcommission were doubtless inspired by the adoption of Art. 27 of the 1966 International Covenant on Civil and Political Rights.[35] This notwithstanding, the Declaration of 1992 cannot be regarded, contrary to expectations,[36] as an interpretation of Art. 27, but rather as the *opinio iuris* of the international community concerning the international rules on minority protection that are in force or *in statu nascendi.*[37]

5. The above few problems I have elucidated may substantiate the conclusion that the incorporation of minority protection in the international regime of human rights was not a perfect success, nor was it presumably viable, given the differences between the two regimes in purpose, subject-matter and structure. As a matter of course, there

31 ALFREDSSON, G.–ZAVAS, A. de: *Minority Rights: Protection by the United Nations,* Human Rights Law Journal, Vol. 14. No. 1–2. pp. 5 et seq.

32 Yearbook ILC, 1991. Vol. II. Part Two, Chapt. VIII. A.

33 Yearbook ILC, 1980. Vol. II. Part Two, p. 30.

34 For, e.g., the so-called crime of "cultural" genocide, see CAPOTORTI: op. cit. No. 5. paras. 220–224.

35 See ibid. No. 9.

36 CAPOTORTI: op. cit. No. 5. para. 617.

37 BOKATOLA: op. cit. No. 4. p. 748.

is a growing recognition that the international protection of minorities has aspects and implications beyond the international regime of human rights. To lend support to this statement I can refer to the growing number of bilateral treaties or treaty provisions and to various draft multilateral instruments. By the nature of things, however, this brief summary cannot take up an analysis of these international documents.

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Enforcing Foreign Arbitral Awards Against Russian Entities

I. Introduction

In August 1991 the world witnessed three days which were to have profound implications for the future of the Soviet Union; 19–21 August 1991 were three days that shook the world. In fact, the failed *coup d'etat* was the first step in the final dissolution of the Soviet Union. It launched the last phase in a process which had already started a couple of years ago. By the end of 1991 the Soviet state had withered away, albeit not in the manner foreseen by Marx.

Before the disintegration of the Soviet Union commenced, far-reaching changes had taken place in the foreign trade system of the country. Changes which had positive as well as negative consequences for Western businessmen involved in foreign trade transactions with Soviet entities. These changes also effected the number and frequency of disputes in the foreign trade area.

Traditionally, there were very few litigated disputes in the previously existing Soviet foreign trade system. Naturally, differences of opinion and disputes did occur, but they were usually settled through negotiations.

However, in recent years the number of disputes has increased significantly. In Stockholm, for example, the Arbitration Institute of the Stockholm Chamber of Commerce is handling an ever increasing number of disputes involving Russian entities, both pursuant to its arbitration rules and in acting as appointing authority in *ad hoc* arbitrations taking place in Stockholm.

Generally, the reasons for the increased number of disputes in this area are to be sought in the following circumstances:

— *As a result of co-operation in the corporate form—typically different kinds of joint ventures—parties have been confronted with considerably more complex problems than arose in traditional sale and purchase transactions;*

— *The re-organization of the foreign trade system has resulted in many new enterprises and entities, typically less experienced than the old centralized foreign trade organizations;*

— *Perhaps most importantly, many Russian companies have severe payment problems with respect to hard currency a situation which often leads to disputes.*

The increased number of actual disputes in the foreign trade area—which in itself is a new phenomenon—has led to yet another new aspect of doing business in the former Soviet Union, viz., the inability—and sometimes, although seldom, unwillingness—of Russian parties to fulfil obligations following from an arbitral award. That is why enforcement of foreign arbitral awards against Russian entities has become a matter of some concern to Western businessmen.

II. Background: The Organization of Foreign Trade[1]

(i) General

As mentioned above there were traditionally very few arbitrated disputes in Soviet foreign trade.[2] When arbitrations did take place and resulted in arbitral awards such awards were always adhered to by the Soviet party in case it was on the loosing end. In fact, until 1990 there were no known cases where a loosing Soviet party did not fulfil the payment obligations in an award. In recent years, however, the situation has changed dramatically. In most cases the arbitral awards are the result of arbitrations arising out of contracts between Western parties and Soviet foreign trade organizations as they existed under the Soviet system of foreign trade. To fully understand and appreciate the problems facing Western parties today, it is therefore necessary to have a basic understanding of the Soviet system of foreign trade in its previous form.

The organization of Soviet foreign trade had seen little change until January 1, 1987. Radical reforms took effect on that date, however. On that date the first step in the decentralization and liberalization of the foreign trade system was taken by granting foreign trade rights to approximately 70 state enterprises and 21 economic ministries, departments and state committees. Prior to this reorganization virtually all Soviet foreign trade was conducted through approximately 50 so-called foreign trade organizations subordinated to the USSR Ministry of Foreign Trade.

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1 This section draws on HOBÉR, K.: Joint Ventures in the Soviet Union. A legal treatise. (1989) Ch. III.

2 In the intra-Comecon foreign trade arbitrations were more frequent. The vast majority of cases decided by the then Foreign Arbitration Commission at the USSR Chamber of Commerce (now: the Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation) consisted of such disputes. See e.g. HOBÉR, K.: Arbitration in Moscow, 2 Arbitration International (1987) 119, 121.

In September 1987 the Central Committee of the Communist Party and the USSR Council of Ministers issued a joint decree calling for further improvements in the management of foreign economic relations. This decree contained, *inter alia*, several provisions intended to facilitate and stimulate the use of foreign currency funds of state enterprises, organizations and ministries. In January 1988, another step was taken: the Ministry of Foreign Trade and the State Committee for foreign Economic Relations, GKES, the latter having primary responsibility for foreign trade with developing countries, were dissolved. At the same time, the Ministry for Foreign Economic Relations was established, replacing the Foreign Trade Ministry and GKES.

In December 1988 yet another step was taken whereby foreign trade was further liberalized. On 2 December 1988 the USSR Council of Ministers issued a decree which stipulated, *inter alia*, that by 1 April 1989 *all* enterprises, organizations, producing cooperatives, and other entities having competitive products or services to offer would be entitled to conduct foreign trade directly, provided they were registered with the Ministry for Foreign Economic Relations.

The reorganization and reform of Soviet foreign trade profoundly altered the well-established patterns of doing business in the Soviet Union, which in turn has had, and still has, a significant impact on the negotiation and completion of contracts.

(ii) The Ministry of Foreign Trade

The fundamental distinctive feature of Soviet foreign trade was the principle of state monopoly of foreign trade. This meant that all trade and, in principle, all commercial contacts with foreign countries were entrusted to certain state organizations, which reported to the USSR Council of Ministers. Soviet foreign trade was thus centralized, a consequence of which was that the various republics had no right to engage in foreign trade.

The highest body in the area of foreign trade was the USSR Ministry of Foreign Trade. The Ministry and its subdivisions occupied the central position in Soviet foreign trade. In addition to the Foreign Trade Ministry and other so-called "expert" ministries, such as the ministries of finance and trade, there was a large number of ministries for various industries that implemented general economic policies within their respective areas. Economic policy guidelines in the Soviet Union were drawn up by the Central Committee of the Communist Party and the Politburo. The Central Committee had a secretariat which included experts in the various areas.

The work of the Ministry of Foreign Trade was led by the Minister of Foreign Trade, named by the USSR Supreme Soviet. The minister and the ten vice-ministers, named by the USSR Council of Ministers, constituted the Ministry's "collegium".

The responsibilities of the Ministry of Foreign Trade included participation in the preparation and development of export and import plans and the direction and control of the activities of foreign trade entities. The ministry participated in the development and negotiation of trade agreements between the Soviet Union and other countries.

(iii) Foreign Trade Organizations

Most of the Soviet Union's foreign trade used to take place through foreign trade organizations—so-called FTOs—that answered to the Ministry of Foreign Trade. These were, as a rule, organized by industry, which meant that each organization was responsible for a certain group of goods. Responsibility was divided so that it was in theory impossible for two organizations to be assigned the same type of goods. Competition among FTOs was thus precluded.

This division by industry also meant that each foreign trade organization achieved a high degree of specialization and expertise in its area. The Soviet foreign trade organizations did not themselves produce goods but rather functioned exclusively as middlemen. They traded products, technology and know-how for producing Soviet entities. Import transactions took place on the basis of agreements entered into between the Ministry of Foreign Trade and the end-user, or the End-user's Ministry. Export transactions, on the other hand, took place on the basis of administrative decisions.

Foreign trade organizations were created by the Ministry of Foreign Trade determining the Articles of Association for the organization, or by a decision of the USSR Council of Ministers. The Articles of Association, which were published, included a list of the product groups each organization was responsible for. Publication itself, however, had no legal effect; the organization became a separate legal entity through the decision taken by the Ministry of Foreign Trade.

A foreign trade organization comprised, in turn, a number of so-called specialized *firms* which were listed in the organization's Articles of Associations. The firms, unlike the organization, were as a rule not separate legal entities.

Foreign trade organizations under the Ministry of Foreign Trade were led by a *general director*, who was appointed and removed from office by the Ministry of Foreign Trade. Soviet commercial life was governed by the principle of the so-called one-man management, which meant that the final right to make decisions rested with the general director. Beneath the general director were a number of vice-directors, who were also hired and fired by the Ministry of Foreign Trade. All authority to represent the organization, however, rested with the general director.

The signing of foreign trade contracts was regulated by a law from 1978, when changes were made in the law governing activities of foreign trade organizations.[3] This law required that all foreign trade contracts be in writing and be signed by two persons, either the general director, a vice-director, directors of the specialized firms within the foreign trade organization, or persons having a power of attorney from the general director.

3 Decree 14 February 1978 of the USSR Council of Ministers, Vedomosti Verkhovnogo Sovieta SSR 1978, No. 10, item 162.

All Soviet foreign trade organizations were separate legal entities.[4] Under Soviet law, this meant that they each had their own assets and that only these could be used to pay for the organization's debts.[5] The Soviet state was thus not liable for the organization's debts, and the organizations were, in turn, not responsible for the obligations of the Soviet state.[6] A foreign trade organization, like all other state organizations that are separate legal entities, had no right of ownership in its own name, however. All rights of ownership belonged to the state. Foreign trade organizations had a so-called right of *operative management* over property in their possession. This meant that the organization could possess, use and transfer property in accordance with applicable laws and regulations.[7]

The question what assets of a foreign trade organization are available for execution is, needless to say, highly relevant in connection with enforcement and execution of foreign arbitral awards. The Soviet foreign trade organization always appeared as the contracting party with the Western party, even though it was never the end-user or the producer of the product. Western companies may thus as a matter of principle execute only on the assets of the foreign trade organization.[8]

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4 This was explicitly set forth in the charters of the foreign trade organizations. For example, in the case of the FTO Stankoimport, section 1 of the charter stipulated, *inter alia*, that Stankoimport "shall be an independent economic organization, shall enjoy the rights of a legal person...".

5 Art. 32 of the RSFSR Civil Code.

6 Art. 33 of the RSFSR Civil Code.

7 When the 1990 RSFSR Law on Ownership was promulgated, a new concept was introduced *viz.*, full economic jurisdiction, together with outright (private) ownership Consequently, Russian legislation on ownership today recognizes these two forms of ownership, or quasi-ownership, in addition to the right of operative management. In the old days, as mentioned above, state enterprises did not *own* the means of production they were using but had a right of operative management with respect to them. The state remained the *owner*. One important consequence of this bifurcation of the rights to means of production was that the state—as the owner—could at any time order the state enterprise what to do with the means of production, despite the fact that state enterprises were always described as separate legal entities. If a state enterprise holds property under the right of full economic jurisdiction, the owner of the property, i.e. the state, only retains the right to a share of the profit produced by the property in question and a rather loosely defined right to control the efficient use of the property. The owner may *not* take away the property from the enterprise as he would have been able to do, had the enterprise held the property under right of operative management. At this point it is not clear to what extent, or which, state enterprises enjoy full economic jurisdiction or operative management rights. For a Western company looking for assets of an FTO, or joint stock company, to execute an arbitral award on, full economic jurisdiction would seem preferable since that typically prevents the state (the owner) from exercising influence on the status of the assets of the state organization.—*See* also discussion in Section IV, *infra*.

8 The possibility of piercing the corporate veil and thereby reaching the assets of the state itself and/or of other state entities, is discussed in Section V, *infra*.

(iv) The situation today

As indicated above the state monopoly of foreign trade has been abolished.

As a result of the decree adopted on 2 December 1988 foreign trade became open to practically all enterprises and organizations in the former Soviet Union. The decree did, however, require registration with the then Ministry of Foreign Economic Relations. On 15 November 1991 President Yeltsin issued a decree which did away also with the registration requirement.[9] As a result of the 1988 Decree the conduct of foreign trade gradually shifted from the traditional foreign trade organizations to other enterprises and organizations which had obtained the right to engage in foreign trade transactions. Although no official statistics are available, it is believed that foreign trade today is to a large extent carried out by other entities than the foreign trade organizations in their original or transformed legal form; many FTOs are believed to have been transformed into joint stock companies, now governed by relevant Russian legislation.[10]

Under the Soviet system of foreign trade the then USSR Foreign Trade Bank (*Vneshtorgbank*)—later renamed the Bank for Foreign Economic Relations (*Vneshekonombank*)—played a vital role. Of particular interest in this connection is the fact that when a foreign trade organization signed a foreign trade contract involving hard currency payments, it had to obtain the approval of the bank. Upon such approval the bank "transferred" the required amount in hard currency to the account of the foreign trade organization in question. This meant that all hard currency payments under the contract were "secured" already when it was signed. This explains why Western parties rarely experienced any problems in receiving payments under such contracts. This system functioned as long as enough hard currency was allocated to foreign trade, which in turn—as a matter of principle—was regulated in the foreign trade plan. As a result of dwindling hard currency earnings, however, the bank has been forced to use whatever hard currency is available for emergency payments, at times using hard currency already reserved for other payments. That is why many foreign trade organizations have found themselves in a situation where hard currency reserved for them when the contract was signed, has been used for other payments.[11]

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9 An English translation of the Decree was published in Soviet Business Law Report, 2 December 1991, 5.

10 Joint stock companies in the Russian Federation are governed by Decree 601 of the RSFSR Council of Ministers, containing the Regulation on Joint Stock Companies; *see* discussion in Section IV, *infra*.

11 In several arbitrations these factual circumstances have been pleaded by the Russian party as constituting *force majeure* or *impossibilium*, thus arguably relieving the Russian entity from responsibility for non-payment. It is not known to what extent arbitral tribunals have accepted such arguments.—As far as the Russian Federation is concerned the bank responsible for foreign trade is now called *Rosvneshtorgbank* and has thus replaced Vneshekonombank; the latter, however, still exists as a separate legal entity and fulfils certain functions with in the framework of the rescheduling of the former Soviet Union's sovereign debt.

III. The Legislative Framework

(i) General

Pursuant to Article 63 of the Fundamentals of Civil Procedure of the USSR and Union Republics, the enforcement and execution of foreign court judgments and arbitral awards are determined by international treaties to which the USSR is a party. Article 63 goes on to say:

> "Foreign court judgements and foreign arbitral awards may be submitted for enforcement in the USSR within three years from the moment of acquiring legal force."[12]

The Soviet Union acceded to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1960.[13] When ratifying the Convention the Soviet Union made use of the reservation provided for in Article I (3) of the New York Convention.[14] The Presidium of the USSR Supreme Soviet made the following pronouncement:

> "The Union of the Soviet Socialist Republics will apply the provisions of this Convention with respect to awards made in the territory of a State not participating in the Convention only on the basis of reciprocity."[15]

The New York Convention proceeds from the assumption that each nation promulgate laws concerning the detailed procedures for the enforcement and execution of awards.[16] In the Soviet Union, however, such municipal legislation was not adopted until 1988 when the USSR Supreme Soviet enacted a Decree *on the Recognition and Execution in*

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12 A similar provision is found in the RSFSR Civil Procedural Code of 1964, Art. 437, and also in the procedural codes of all the former republics of the Soviet Union.

13 Vedomosti Verkhovnogo Sovieta 1960, No. 46, item 421.

14 Art. I.3 of the New York Convention reads:
"When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

15 Vedomosti Verkhovnogo Sovieta 1960, No. 46, item 421.

16 See Art. III which reads:
"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

the USSR of Decisions of Foreign Courts and Arbitral Tribunals.[17] From a practical point of view this legal vacuum which thus existed for more than 25 years did not cause any problems, since there were no cases where the winning side in an arbitration with a Soviet entity had to seek recourse to Soviet courts to have his award enforced.

Thus, until the dissolution of the Soviet Union in 1991, it was clear that enforcement and recognition of foreign arbitral awards were governed by the 1958 New York Convention and the 1988 Decree.[18]

To complete the picture, however, it is necessary to take into account also the numerous bilateral treaties signed by the former Soviet Union and containing provisions on arbitration. Some of these treaties provide for the recognition and enforcement of arbitral awards rendered pursuant to arbitration agreements between parties from the respective countries.[19] The magnitude of bilateral arrangements in this area may create

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17 Vedomosti Verkhovnogo Sovieta 1988, No. 26, item 427. This decree is discussed on pp. 41–43, infra.

18 Even though the New York Convention is without comparison the most important international document in this area, for the sake of good order, it should be mentioned that the Soviet Union also ratified the 1961 European Convention on International Commercial Arbitration in 1962 (Vedomosti Verkhovnogo Sovieta 1962, No. 20, item 210).

19 For a discussion of this question, see GINSBURGS: Execution of Foreign Arbitration Awards; The Heritage of Domestic Legislation, Bilateral Treaties and Intra-Comecon Ententes, in A. J. Schmidt (ed.), The Impact of Perestroika on Soviet Law (1990) 457–490. In an appendix, Ginsburgs lists the following post-war Soviet bilateral treaties for the mutual recognition and enforcement of commercial arbitral awards.

- Trade treaty with Poland. 7 July 1945
- Treaty of commerce and navigation with Romania, 20 February 1947
- Treaty of commerce and navigation with Hungary, 15 July 1947
- Trade treaty with Finland, 1 December 1947
- Treaty of commerce and navigation with Czechoslovakia, 11 December 1947
- Trade treaty with Switzerland, 17 March 1948
- Treaty of commerce and navigation with Bulgaria, 1 April 1948
- Treaty of commerce and navigation with Italy, 11 December 1948
- Trade and payments agreement with Afghanistan, 17 July 1950
- Treaty of commerce and navigation with Austria, 17 October 1955
- Treaty of commerce and navigation with the German Democratic Republic, 27 September 1957
- Trade treaty with Japan, December 1957
- Trade treaty with Mongolia, 17 December 1957
- Treaty of commerce and navigation with Albania, 15 February 1958.
- Treaty of commerce and navigation with the Democratic Republic of Vietnam, 12 March 1958
- Treaty of commerce and navigation with the Chinese People's Republic, 23 April 1958
- Agreement on general questions of commerce and navigation with the Federal Republic of Germany
- Treaty of commerce and navigation with the Korean People's Democratic Republic, 22 June 1960
- Trade agreement with Syria, 4 November 1965
- Treaty on reciprocal procurement of legal assistance with Iraq, 22 June 1973
- Trade and payment agreement with Afghanistan, 20 March 1974
- Trade treaty with Laos, 22 April 1976
- Trade agreement with Cyprus, 24 November 1976
- Trade agreement with Greece, 29 April 1977
- Trade agreement with Algeria, 17 November 1979
- Trade agreement with Kampuchea, 5 February 1980

quite complicated situations when countries are parties both to a bilateral treaty and to the New York Convention. By and large, however, this problem is taken care of by Art. VII (1) of the New York Convention which stipulates that it (the Convention) "shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States". This means that parties coming from states which have signed the New York Convention as well as a bilateral treaty may choose to rely either on the New York Convention or the bilateral arrangement. This could be of importance in situations where the list of defenses against recognition and enforcement present differences. On the other hand, it may be that the bilateral treaty in question contains provisions to the effect that it is not possible to choose. In all likelihood, however, this is a rare situation.

(ii) Is the Russian Federation a Member of the New York Convention?

The events of August 1991 were nothing less than a new revolution which had far-reaching consequences in the political, economic and legal fields. In fact, the failed *coup d'etat* trigged the final dissolution of the Soviet Union. The formal dissolution of the Soviet Union took place on 8 December 1991 when the so-called Minsk Agreement was signed by the Republic of Belorussia, the Russian Federation and the Ukraine.[20] The purpose of this Agreement was to create the Commonwealth of Independent States. In the preamble, however, the Parties to the agreement stated—in passing, as it were—that the USSR had ceased to exist as a subject of international law, as a "geopolitical reality". Furthermore, in Article 11 of the Minsk Agreement it is said that as of the signing of the agreement, the laws of third states, including the USSR, are not valid on the territories of states which sign the agreement. In other words, as of 8 December 1991 Soviet law was no longer applicable on the territory of the Russian Federation.

The dissolution of the Soviet Union raised a number of important and difficult issues concerning state succession and the international obligations of the former Soviet Union. For example, would the Russian Federation *ipso facto* be bound by international treaties—such as the New York Convention—signed by the Soviet Union, or would it accept to be so bound? The parties to the Minsk Agreement partially addressed this issue in that they guaranteed "the fulfillment of international obligations, treaties and agreements of the former Union of Soviet Socialist Republics coming from these

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– Trade agreement with Nicaragua, 19 March 1980
– Trade agreement with Grenada, 11 June 1980
– Trade agreement with India, 10 December 1980
– Treaty on reciprocal procurement of legal assistance with Algeria, 23 February 1982
– Treaty on reciprocal procurement of legal assistance with the People's Democratic Republic of Yemen (South Yemen), 6 December 1985.—See also, LEBEDEV, Mezhdunarodnyj torgovyj arbitrazh (1965) 165–195.

20 An english translation of the Minsk Agreement was published in New York Times on 10 December 1991, Section A, p. 19.

obligations".[21] The Minsk Agreement was followed by the so-called Alma Ata Declaration on 23 December 1991.[22] One important result of this Declaration was that another nine of the former Soviet Republics joined the Commonwealth of Independent States (the "CIS"), created by the Minsk Agreement. In the preamble, the member states of the CIS seemed to qualify Article 12 of the Minsk Agreement in saying that they "guarantee *in accordance with their constitutional procedures*, the fulfilment of international obligations stemming from the treaties and agreements of the former USSR", (*emph. added*). This probably meant that CIS member states took the position that they would be bound by such obligations in so far as their respective parliaments ratified such treaties.

With respect to the Russian Federation, it has been assumed by many observers in the West that the Russian Federation is the successor state to the Soviet Union, and as such is thus bound by the international obligations of the former Soviet Union. Indeed, the Russian Federation itself has declared itself to be such successor state.[23] In a *note verbale* dated 26 December 1991 the Ministry of Foreign Affairs of the Russian Federation stated that the Russian Federation would continue the participation of the Soviet Union in all conventions, agreements and other international legal instruments concluded within the framework of the United Nations. In a further *note verbale* dated 27 January 1992 the Permanent Representative of the Russian Federation to the United

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21 Article 12 of the Minsk Agreement.

22 An English translation of the Alma Ata Declaration was published in New York Times on 23 December 1991, Section A, p. 10.

23 Generally speaking, the disintegration of the Soviet Union presents a number of very complicated issues under international law. Indeed, it is doubtful if the traditional "law of state succession" is capable of providing the answers to these issues. It should be emphasized that the term "state succession" does not connote that a succession of rights and duties occurs as a matter of course. Rather the term is used to *describe* a problem area of international law. *See*, e.g. BROWNLIE, I.: Principles of Public International Law (3rd ed. 1979) 652. It is used to describe the legal effects that occur when one state is replaced by another state with respect to sovereignty over a given territory. In particular it is important to focus on the identity and continuity of states in connection with changes of sovereignty over territory. If a state retains its identity despite territorial changes, as a matter of general principle, the state continues to be bound by its obligations. By contrast, if the state does not retain its identity—and thus a new state is created—the new state does not at that moment have any rights and obligations, with the exception for those that follow from the general principles of public international law cf. e.g. MAREK, K.: Identity and continuity of States in Public International Law (1954) 9–14. Even though it has obviously been expedient—and perhaps necessary—from a political and practical point of view to accept the Russian Federation as the successor state to the Soviet Union, it is submitted that a thorough factual and legal analysis would not necessarily lead to this result. Furthermore, it is doubtful if international law permits the acceptance of unilateral declarations of the state in question as the basis for resolving issues of state identity and state succession. What if the Russian Federation had declared what it was *not* bound by the treaties signed by the Soviet Union? It should be noted that the Vienna Convention on Succession of States in Respect of Treaties, which was adopted in 1978 by a United Nations Conference, has not yet entered into force. Furthermore, Article 7 of this Convention stipulates that it will apply, when in force, "only in respect of a succession of states which has occurred after the entry into force of the Convention, except as may otherwise be agreed". Consequently, the Vienna Convention will not apply, even when it comes into force, to the various issues arising from the dissolution of the Soviet Union, unless otherwise agreed.

Nations brought to the attention of the Secretary-General the text of a *note* from the Ministry of Foreign Affairs of the Russian Federation to the heads of diplomatic missions in Moscow to the effect that the Russian Federation would continue to exercise the rights and honor the obligations arising from international treaties signed by the Soviet Union. On the basis of these declarations, the Secretary-General has taken the position that he will replace the name "Union of Socialist Republics" with the name "Russian Federation" in the lists of parties or signatories to treaties which were in force for, or which had been signed by the USSR as of 24 December 1991.[24] For practical purposes it has thus been assumed that the Russian Federation is bound by all international treaties signed by the Soviet Union, including, presumably, the 1958 New York Convention.

However, the New York Convention itself contains provisions with respect to ratification and accession. Article IX (2) stipulates that accession shall be effected by the deposition of an instrument of accession with the Secretary-General. Furthermore, pursuant to Article XII (2) the Convention takes effect on the ninetieth day after deposition of an instrument of ratification or accession for states ratifying or acceding to the Convention after its coming into force.[25] The Russian Federation has not deposited any instrument of ratification or accession as prescribed, and it will in all likelihood not do so, since the United Nations have accepted the declarations described above. On the basis of this acceptance, and taking into account the willingness of the Russian Federation to be bound by the international treaties signed by the Soviet Union, it is reasonable to assume that the Russian Federation is now deemed to be a member of the New York Convention, notwithstanding the fact that it has not complied with the explicit provisions of the Convention itself.

To date there is at least one case where a Russian court has applied the provisions of the New York Convention.

On 23 January 1992, the Moscow City Court rendered judgment in a case which is believed to be the first case of enforcement of a foreign arbitral award rendered in a non-socialist country.[26] The Russian party raised the objection that the awards could not be enforced, since the Russian Federation had not ratified the 1958 New York Convention. The court rejected this argument referring to Article 12 of the Minsk Agreement pursuant to which the Russian Federation as one of the signatories had undertaken to fulfil the

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24 This position was explained by the UN Under-Secretary-General for Legal Affairs—Mr. Carl-August Fleischhauer—in a letter dated 2 March 1992 and addressed to the Director for Legal Affairs of the Council of Europe, Mr. Erik Harremoes.

25 Article XII reads:

"1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument or ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession."

26 The Western party had obtained twelve separate, but virtually identical, arbitral awards in London. The Moscow City Court thus had twelve awards before it, but they were all treated in the same manner.

international obligations of the former Soviet Union. The Russian party never appealed the decision of the Moscow City Court, but rather paid the amounts stipulated in the arbitral award shortly after having received the judgment.

Even though the application of the New York Convention has not been addressed by any higher court in the Russian Federation, it would seem reasonable to assume that other courts would follow the example of the Moscow City Court.

Another potentially troublesome aspect of the Minsk Agreement was the declaration that Soviet law was not applicable on the territory of the Russian Federation. Since the Russian Federation has, needless to say, not had time to introduce its own laws in many areas, there arises the issue of what laws *do* apply? In particular, is the 1988 Decree On the Recognition and Execution in the USSR of Decisions of Foreign Courts and Arbitral Tribunals still applicable? This problem was addressed by the Supreme Soviet of the Russian Federation when it ratified the Minsk Agreement and the Alma Ata Declaration on 12 December 1991. The Supreme Soviet declared that in the absence of Russian legislation in a given area, Soviet laws and regulations would apply in so far as they do not contradict existing Russian legislation, the constitution or the Minsk Agreement.[27]

(iii) The 1988 Decree

As mentioned above, the relevant municipal legislative act is the "1988 Decree" *On the Recognition and Execution in the USSR of Decisions of Foreign Courts and Arbitral Tribunals ("the 1988 Decree")*. Pursuant to that decree an application for the enforcement of a foreign arbitral award is tried at the request of the claimant by the Supreme Courts of union republics where no *oblast* division exists, the Supreme Courts of autonomous republics *krai, oblast*, city courts, courts of autonomous *oblasts* and autonomouts *okrugs* at the domicile of the debtor and, if the debtor has no domicile in the USSR or the domicile is unknown—at the place where the property is located.

It is noteworthy that although ordinarily district (city) people's courts are assigned the task of issuing writs of execution, a higher level of the court system is charged with the task of trying applications under the 1988 Decree.

An application seeking enforcement of a foreign arbitral award must indicate: the name of the claimant, as well as his representative if the petition is filed by the latter, information regarding the claimant's (and, if applicable, its representative's) permanent or temporary place of residence and if the claimant is a juridical person—its location; the name of the debtor, information on his permanent or temporary place of residence and, if the debtor is a juridical person its—location; the request of the claimant for enforcement and in the event the award was previously enforced, information regarding what portion and from which date enforcement of the award is called for.

The decree does not list what documents must accompany the application. It refers instead to the relevant provisions of the treaty in question. Where an international treaty,

27 Vedomosti Verkhovnogo Sovieta 1991, No. 51, item 1798.

on the basis of which recognition and enforcement is sought in the USSR of an arbitral award does not list the required documents, the relevant language of the 1958 New York Convention is invoked to fill the gap.[28] That list includes originals of the arbitral decision duly authenticated, or a duly certified copy thereof and the original of the agreement to submit the dispute to arbitration, or duly certified copies thereof; furthermore, if the arbitral award or agreement is not written in the official language of the country where recognition and enforcement are sought, the requesting party shall furnish a translation of these documents in that language.[29] The translation must be certified by the official or deputized translator or consular institution.

Hearings on the petition are conducted in open court session with notification to the debtor of the time and place of the hearing.[30] Failure of the debtor to attend without valid reason when the court knows that notice has been served does not bar hearing of the application.[31] If the debtor has filed a request with the court to reschedule the hearing and the request is recognized by the court as valid, the court reschedules the hearing and informs the debtor of the new date. After hearing the debtor's arguments and studying the documents submitted, the court issues an order granting enforcement of the foreign arbitral award or denying leave to execute.

With respect to foreign arbitral awards, the 1988 Decree itself spells out only one round for refusing to execute an award namely, that the deadline for submitting a decision for enforcement set forth in Article 63 of the Fundamentals of Civil Procedure of the USSR and union republics has lapsed.[32] Otherwise, a general reference is made in Section 11 of the 1988 Decree to international treaties in this area which have been signed by the Soviet Union, including the 1958 New York Convention. In so far as the claimant relies on this convention, the grounds for refusal of recognition and enforcement listed in Article V are thus applied.[33] The drafters of the Convention put the onus on

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28 *See* Article IV of the 1958 New York Convention.

29 1988 Decree, Section 2.

30 *Id.* Section 3.

31 1988 Decree, Section 4.

32 *See* discussion on pp. 44–45, *Infra.*

33 Article V of the 1958 New York Convention reads:

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party finished to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

raising these defenses squarely on the shoulders of the losing side. So, when the decree refers to the Convention, this allocation of burden of proof is imported into the Russian legal system where, traditionally, the tendency has been not to delineate such responsibilities but rather to allow courts a free hand in establishing the pertinent facts and not be bound by the activities of the parties and their counsel.

As of today there are no *reported* court cases on the application of the 1958 New York Convention in Russia. Consequently, it is difficult, if not impossible, to predict what the future holds for Western companies trying to enforce arbitral awards. One can only hope that Russian courts will adhere to the pro-enforcement policy which has been adopted by must member-states of the 1958 New York Convention.

A copy of the ruling to grant or refuse leave for execution of a foreign arbitral award is dispatched by the court to the claimant or his representative and the debtor within three days from the date of issuance. The ruling can be contested in the superior court in the manner and on the terms set forth in existing legislation. On the basis of the decision of the foreign arbitral tribunal and the final court ruling sanctioning execution, a writ of execution is issued and relayed to the people's court at the place of execution of the arbitral award. Actions for execution of a foreign arbitral award are effected by the bailiff in accordance with existing legislation. Bailiffs (execution officers) are affiliated with district (city) people's courts. Execution of a particular award is handled by the bailiff of the peoples court where the defendant is domiciled, or his property is located.[34] Thus, in the case of foreign arbitral awards, this means that in Moscow for example, the Moscow City Court will send the writ of execution to the bailiff of the relevant peoples court in Moscow for execution. A judge at such court supervises the execution procedure to ensure proper and timely conduct thereof.[35]

The 1988 Decree does not address what is to happen at this stage of the proceedings. An older instruction of the USSR Ministry of Justice of 24 June 1973, No. 7, as amended and supplemented by order No. 11 of 1 August, 1978,[36] contains a subsection under the heading of "Execution of decisions of foreign courts and arbitral tribunals and procedure of transmitting abroad the monetary amounts levied" which, *inter alia*, stipulates the following:

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d) The composition of the arbitral authority or the arbitral procedure was not in a accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) Thee recognition or enforcement of the award would be contrary to the public policy of that country."

34 RSFSR Civil Procedural Code, Art. 348.

35 *Id.* Art 349.

36 Bulletin normativnykh aktov ministerstv i vedomstv SSSR 1979, No. 11, 7–45.

"200. The sums levied pursuant to executory documents in favor of citizens living abroad in socialist countries are transmitted to the claimants by the institutions of the USSR State Bank and USSR Foreign Trade Bank at the behest of the enterprises, institutions, organizations paying these sums or effecting withholdings from the salary of the debtor.
In case these sums are entered on the deposit accounts of people's courts, their transfer to the claimants is effected by a payment order to the institutions of the USSR State Bank where these deposit accounts are located to subtract these sums and transmit them to the address of the claimant.
201. The sums levied from Soviet organizations or citizens in favor or persons living abroad in other (besides socialist) countries are stored in the deposit account of the people's court until receipt by the claimants of permission to transfer these sums abroad or enter them in accounts of the claimants opened in savings offices and other credit institutions of the USSR.
Upon receipt of the appropriate permission, the transfer of the indicated sums abroad is effected through the USSR Foreign Trade Bank."

It is unclear whether or not this 1973 instruction has been replaced by more recent instructions.

In conclusion, it must be emphasized that even though there seems to exist—at least on paper—a system of executing "authorities", i.e. the bailiffs affiliated with the people's courts, it has hitherto never been put to test with respect to foreign awards. Again, one can only hope that a pro-enforcement policy will prevail.

(iv) Interim security measures

Chapter 13 of the RSFSR Civil Procedural Code contains provisions on security measures. Article 433 of the same code stipulates that foreigners enjoy the same procedural rights as Soviet citizens. Thus, as a matter of principle, the security measures outlined in Chapter 13 are available to Western parties trying to safeguard their interests during an ongoing arbitration, or in enforcement proceedings. Available security measures include arrest of property, injunctive relief prohibiting the defendant from taking certain measures, and injunctive relief prohibiting third parties from transferring property to the defendant or from fulfilling other obligations in relation to the defendant.[37] The RSFSR Civil Procedural Code does not contain any restrictions with respect to the specific types of claims for which security measures may be sought.

An application for security measures must be filed with the "court hearing the case" and be decided by such court on the same day as the application is made.[38] The defendant and other persons participating in the case are not given notice of the appli-

37 RSFSR Civil Procedural Code, Art. 134.
38 *Id.* Art. 136.

cation. It is important to note that the quoted language has been interpreted to mean that arrest of property is possible only in a case pending before the very court hearing the actual dispute. This means that it is *not* possible to obtain an arrest order by a Russian court in an ongoing arbitration, since the case is not pending before any court at all, but rather before an arbitration tribunal.[39] Furthermore, even if the arbitration proceedings have not yet been initiated it will be impossible to obtain an arrest order since a Russian court will not accept jurisdiction of a dispute which is covered by an arbitration clause.[40]

However, the situation would seem to be different in an enforcement proceeding pending before a Russian court. Although it is unclear if any Russian court has actually ruled on the issue, it would seem to follow from Article 136 of RSFSR Civil Procedural Code that the court hearing the enforcement case is authorized to issue an arrest order.

When granting an application for security measures, the court may require the claimant to provide a guarantee, or security, for possible damages to the defendant.[41]

It should also be mentioned that the 1968 USSR Merchant Shipping Code empowers port authorities to detain ships and cargo located in the port in question upon the request of persons having claims based on salvage, general average, collisions between ships, or any other damage. However, such order by port authorities is valid only for three days; if no attachment order with respect to ship or cargo is issued by a competent court within that time period, the ship or the cargo, as the case may be, must be released immediately.[42]

(v) Statute of limitations

Article III of the New York Convention stipulates that a state's enforcement procedures for foreign arbitral awards may not be substantially more onerous than those applicable to domestic awards, nor may the charges or fees be substantially higher.

In other words there may be differences between foreign and domestic awards, since the New York Convention does not prescribe assimilation between domestic and foreign awards, but rather prohibits procedures for foreign awards from being *substantially more onerous*. One area where there may be differences between jurisdictions is the time period during which an arbitral award remains enforceable, i.e. questions relating to the statute of limitations. Generally, there would seem to be at least three approaches to this

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39 In the enforcement case mentioned above on p. 41, the Western company applied for an arrest order—while the arbitration was still pending—with the courts of first instance in Moscow, St. Peterburg and Tallinn. All three courts denied the application on the ground that the dispute was not being heard by the court in question. The decisions of the lower courts were affirmed on appeal. Before the Western company appealed to the courts of last instance the Russian Party paid the amounts in question.

40 Article 6 of the RSFSR Civil Procedural Code stipulates, *inter alia*, that a court shall terminate the proceedings "if there is an agreement between the parties to refer the dispute in question for settlement by an arbitral tribunal".

41 RSFSR Civil Procedural Code, Art. 140.

42 1968 USSR Merchant Shipping Code, Art. 76.

issue, *viz.*, no limitation at all, application of the ordinary statute of limitation and introduction of specific time limits for arbitral awards.[43]

Pursuant to Article 63 of the Fundamentals of Civil Procedure of the USSR and the Union Republics, foreign arbitral awards must be presented for execution in the USSR within *three years* from the date they became final. Under Soviet law this provision is deemed to be mandatory and must be complied with irrespective of whether the disputed contract was subject to Soviet law or not.[44]

The statute of limitation thus starts to run when the award becomes final, which as matter of principle should be determined by the applicable foreign law. Unless the parties have agreed otherwise the law of the place of the arbitration, i.e. the *lex arbitri*, will be applied to determine the finality of the award.

However, it has been suggested that it would be sufficient for an award to have become binding pursuant to Article V(1)(e) of the New York Convention,[45] without necessarily resorting to lex arbitri.[46] This would seem to follow from Article 438 of the RSFSR Civil Procedural Code which stipulates that if an international treaty to which the Soviet Union is a party contains rules other than those contained in Soviet legislation, the treaty takes precedence.[47] Even though there is consensus that the term "binding" in the New York Convention was intended to do away with the so-called "double exequatur" requirement, i.e. the requirement to have the award reduced to a judgment by a court in the country where the award was rendered, the position is less clear as to when an award becomes binding under the New York Convention. The number of court cases ruling on this issue is still fairly limited.[48] This notwithstanding the generally held view is that an award becomes binding under the New York Convention as soon as it no longer is open to review on the merits, even if it may be open to nullification proceedings. In practice this means that an award becomes binding when it is rendered,[49] at which moment the three year period thus starts to run.

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43 LEBEDEV: How long does a foreign a award stay enforceable?, in The Art of Arbitration (eds. Schultz–van den Berg) Liber Amicorum Pieter Sanders (1982) 220.

44 LUNTS, L. A.: Mezhdunarodnyi grazhdanskii protsess (1966) 103.–This presupposes that the barring of claims by lapse of time is classified as a procedural matter as opposed to a matter of substantive law. Procedural matters are governed by *lex fori*, i.e. Russian law, whereas substantive matters are governed by *lex contractus*. Under Swedish law, for example, this classification is done the other way around, that is to say that questions of limitation are classified as matters of substantive law, *see* e.g. Arbitration in Sweden, second (revised) edition (1984), 55, n. 18.

45 Lebedev, *supra*, not 32, at 218.

46 *See* SANDERS, P.: Vingt années de la Convention de New York de 1958, in Droit et pratique du commerce international (1979) No. 3, 369-370.

47 Article 438 of the RSFSR Code of Civil Procedure which reads in translation: "If, an international treaty to which the USSR is a party, lays down rules other than those in Soviet civil procedure legislation, then the rules of the international treaty shall apply".

48 One notable exception is the so-called Götaverken-case (Götaverken Arendal Aktiebolag v. General National Maritime Transport Company, NJA 1979 p. 527). For a discussion of this case *see* e.g. Arbitration in Sweden second (revised) edition (1984) 165–168.

49 VAN DEN BERG: The New York Arbitration Convention of 1958 (1984) 345.

It is not unusual that the Russian party takes the initiative to commence "settlement negotiations" anew even after an award has been rendered in favor of the Western party. The purpose of such negotiations is usually to try to find ways of paying the amounts in question. When agreeing to participate in such negotiations, it is important to keep the above-described time limitations in mind. Pursuant to Article 346 of the RSFSR Civil Procedural Code the statute of limitation is tolled, and a new three year period starts, when the necessary documents are presented for executing, i.e. when an application for enforcement is made pursuant to the provisions of the 1988 Decree. In other words, participation in settlement discussions or negotiations, is not sufficient to toll the statute of limitation.

IV. Assets Available for Execution

Assuming that a Western party has been successful in enforcement proceedings before a Russian court and has obtained a writ of execution, the crucial question is which assets of the Russian counterparty are available for execution. In discussing this question a distinction must be drawn between FTOs established under the state monopoly of foreign trade and continuing to function in their old form, on the one hand, and FTOs transformed into joint stock companies, on the other.

(i) Foreign trade organizations

The assets of a foreign trade organization are carefully segregated from those of the state and of other state enterprises. For example, Article 33 of the RSFSR Civil Code explicitly stipulates that the state is not liable for the obligations of other state organizations. Each foreign trade organization is initially allocated capital which it may use for any purpose consonant with its charter, the amount of which is specified in the charter. The same basic rules of segregation apply to assets of foreign trade organizations which have been transformed into joint stock companies. Joint stock companies are regulated by a decree—No. 601—adopted on 25 December 1990 by the RSFSR Council of Ministers, ("Decree 601").

Since most foreign trade organizations are non-producing, trading, entities and thus maintain little or no equipment, their assets typically include only warehouses, office equipment and goods. The assets available for execution are further limited by the fact that assets are divided into *basic assets* and *circulating assets*, only the latter category being available for execution. Under Soviet law basic assets were immune from execution.[50] Circulating assets include money and goods held for sale. Such assets are in turn divided into (i) items with a useful life over one year and (ii) items which, irrespective of useful life, have a value under a figure determined by each ministry.[51]

50 RSFSR Civil Procedural Code, Art. 411.

51 Kommentarii KGPK RSFSR (Commentary to the RSFSR Civil Procedural Code) (1976) 532.

However, not even all circulating assets are available for execution. For example, amounts needed to pay wages already due as well as wages for the next fifteen-day period are exempted from execution.[52]

Goods in transit are among a foreign trade organization's circulating assets and thus as a matter of principle available for execution. However, import goods never come into a foreign trade organization's operative management because it purchases goods on behalf of the end-user as a commission agent.[53] On the other hand, export goods are purchased by the foreign trade organization outright. Typically, however, title passes to the foreign purchaser at the same time as the producer loses his right of operative management. In other words the foreign trade organization never acquires operative management.[54] Consequently, there is little in the way of assets available for execution, except for funds in bank accounts. In light of the fact that the traditional foreign trade system has been abolished and taking into account the changing nature of Russian law today it is uncertain to what extent the above-described rules still apply, even if the foreign trade organization in question has not changed its organizational and legal form.

For all practical purposes, the only assets available for execution today would seem to be funds in bank accounts. Indeed, this was also the situation under the old system of Soviet foreign trade. Pursuant to Article 409 of the RSFSR Civil Procedural Code, execution of judgments and awards against state enterprises and other state entities was to be levied, in the first place on funds in bank accounts. Only if such funds were insufficient, could execution be levied on other property of the state; entity, with the exceptions provided for by law which have been discussed above.

In cases where the amount levied is insufficient to satisfy all the claims of creditors, Soviet law laid down the following priorities:

(1) Claims to recover alimony; claims of workers and employees based on labor relationships; claims of kolchos members connected with their work in the kolchos; attorney's fees; claims for remuneration due to authors based on copyright, right to discovery, or invention covered by an author's certificate, or an improvement suggestion; claims for damages caused by bodily injury or other harm done to human health, or by death of the breadwinner; upon full satisfaction of the above claims, social insurance claims will be satisfied;

(2) Claims for state and local taxes and non-tax budgetary revenues, and claims of the organs of State insurance concerning compulsory insurance; claims for damages suffered by state enterprises, institutions, organizations, collective farms and other social organizations as a result of breaches of law;

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52 GENKIN, D. J. (ed.): Pravovye regulirovanie vneshnei torgovli SSSR (1961) 53. It is uncertain, however, whether this still applies since the source is more than 30 years old and since it has not been possible to ascertain whether or not these rules have been repealed, or are still in effect.

53 Genkin, *op. cit.*

54 This follows from Order of the Minister of Foreign Trade, 26 January 1960, No. 25 'On the Condition of Delivery of Goods for Export', in Sbornik normativnykh materialov po voprosam vneshnei torgovli SSSR, vol. 2 (1961) 27–46.

(3) Secured claims of State credit institutions connected with their credit operations;

(4) Non-secured claims of state institutions, enterprises, collective farms and other cooperative and social organizations;

(5) All other claims.[55]

Pursuant to this list, most foreign arbitral awards rendered against Russian entities would in all likelihood fall into the last category of claims.

(ii) Joint stock companies

As mentioned above, a good number of foreign trade organizations have been transformed into joint *stock companies*.[56] In many cases it would seem that the state—through a ministry—is the majority shareholder. Section 9 of Decree 601—the Joint Stock Companies Regulation—stipulates that the company is not responsible for the obligations of the shareholders. One would have expected to find the corollary to this principle, i.e. that the shareholders are not responsible for the obligations of the company. However, Section 8 of the Joint Stock Companies Regulation stipulates that the shareholders are liable for the obligations of the company to the extent of their investment in the (share) capital of the company. This language notwithstanding, the generally held opinion seems to be that the shareholders cannot be made *personally* responsible for such obligations. Rather, the underlying philosophy seems to have been a desire to explain that the investment of a shareholder may be at risk if execution is levied on the property of the company.

Section 10 of the Joint Stock Companies Regulation contains a very important provision in that it states explicitly that a joint stock company is responsible with *all* its assets for its obligations. Thus, with respect to joint stock companies the exemptions from execution described above do not apply. This is a significant change, since nowadays also

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55 *See* Decree of the Presidium of the USSR Supreme Soviet of 5 May 1981, as amended on 2 December 1987, On the Priority of Satisfying Claims on the Basis of Writs of Execution (Vedomosti Verkhovnogo Sovieta 1981 No. 19, item 711 and 1987 No. 49, item 791).

56 This transformation process took place, to a large extent, prior to adoption of the Russian privatization legislation, and in some cases prior to the adoption of Decree 601 in December 1990. With respect to the latter category of joint stock companies, special decrees were typically issued by the then USSR Council of Ministers. To ascertain the legal status of such joint stock companies it is thus necessary to review the special decree in question. The Russian Privatization Law was adopted 3 July 1991 and the 1992 State Privatization Program in June 1992. Primarily on the basis of these two normative acts a number of additional legislative acts have been promulgated during the summer and fall of 1992, including, *inter alia*, the so-called Corporatization Decree of 1 July 1992. Pursuant to the Corporatization Decree *all* large state enterprises, as defined in the Decree—including any remaining FTOs—must be transformed into joint stock companies, the shares of which are subsequently to be sold in the privatization process. This decree also includes a standard charter which all newly formed joint stock companies must adopt. Intitially, prior to the sale of shares in the privatization process, all shares of the company are owned by the state. Neither the decree itself, nor the standard charter contain any specific provisions limiting the assets of such joint stock companies on which execution may be levied. Therefore, Section 10 of Decree 601 presumably applies in this respect.

producing entities—with equipment and other potentially valuable assets—have foreign trade rights. On the other hand, the provisions with respect to state organizations contained in the RSFSR Civil Procedural Code discussed above have not been changed. Thus, it is possible that presumably they could still be relied on by state enterprises engaged in foreign trade. An important question in this connection is whether a joint stock company which is wholly owned by the state—typically because its predecessor is a state enterprise—remains a state organization, or does the creating of a separate joint stock company remove it from this category, giving the company itself, rather than the state, ownership rights over its property? The latter would be the natural conclusion if one proceeds from traditional Western notions of separate legal entities. Unfortunately, however, there is as yet no clear answer. If the joint stock company were to be characterized as a state organization, it would seem likely that the company could rely on the aforementioned provisions of the RSFSR Civil Procedural Code.[57]

V. Piercing the corporate veil

(i) General

As Section IV above makes clear, the assets of a foreign trade organization available for execution are very limited. In practice this would seem to be the situation also with respect to FTOs which have been transformed into joint stock companies, as well as with respect to other legal entities engaged in foreign trade. This is why some Western creditors have tried to execute on the property of other state entities, or on the property—of the state itself. Even though the legal status under Soviet civil law of an FTO made it appear rather independent of the state and the government, the administrative-legal status of an FTO changed the picture considerably: administrative superiors created the FTO, appointed its management, planned and supervised all its commercial activities. As discussed in Section II above, the Council of Ministers created, merged, divided and liquidated FTOs on the recommendation of the minister of foreign trade and property was held, not with ownership rights, but rather on the basis of operative mangement.[58]

Although the independence of an FTO as a legal entity—from which assumption the provisions of the RSFSR Civil Code theoretically proceed—was thus a fiction, Western businessmen, generally speaking, accepted the idea that an FTO was a separate legal entity, and that the Soviet state was not responsible for the obligations of the FTO.

57 Chapter 39 of the RSFSR Civil Procedural Code contains provisions concerning execution on the property of citizens. As of today, the Procedural Code does not contain any provisions with respect to execution on the property of privately owned, i.e. non-state-legal entities. In the old days no such provisions were necessary since all commercial activities were carried out by state organizations within the framework of the planned economy. Clearly, the Procedural Code must be amended in this respect.

58 *See* pp. 36–38. *supra.*

However, it is submitted that this acceptance was based on a tacit understanding that the state would always see to it that obligations of the FTO in question were fulfilled and its debts paid. Indeed, this was in fact the situation until recently. In the view of some Western businessmen and observers, the Russian Government is now taking away what it has earlier given, thereby defacto creating a situation in which the Russian Government may no longer stand behind the obligations and debts of the FTOs[59] and the FTOs have no assets available for execution; this—the argument continues—is tantamount to an evasion of obligations, and the state must therefore bear the responsibility for the situation it has created. In other words, it has been argued that it must be possible to pierce the corporate veil of the FTO and execute on other state property. Guided by this line of reasoning some Western creditors have attempted to arrest the property of other FTOs, or other state entities, located abroad to make themselves paid pursuant to arbitral awards rendered against FTOs.

Even though questions related to piercing the corporate veil are among the classic issues of international law, it is not until recently that they have become issues in Soviet/Russian foreign trade.[60]

As a matter of principle, the starting point in trying to resolve these issues must be that in cases where it follows from *lex corporationis*[61] that an enterprise has a separate

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59 *See* note 11 at p. 38 *supra.*

60 Generally speaking most legal systems proceed from the assumption that the separation from a legal entity of its owners should be respected. However, some legal systems recognize that under exceptional circumstances such separation should not be accepted. With respect to the United States, see e.g. BURKHARD: Neuere Probleme der Haftungsdurchgriff bei juristischen Personen im Recht der vereinigten Staaten (1969) and SERICK, Rechtsform und Realität juristischen Personen (1955); for comparative studies, *see* e.g. BASTID, S.–DAVID, R.: La personalité morale et ses limites (1960) and COLM–SIMITIS: Lifting the Veil in the Company Laws of the European Continent, 12 ICLQ (1963) 189ff. For treatment of the problem of piercing the corporate veil in international trade and commerce *see* e.g. BÖCKSTIEGEL, K. H.: Der Staat als Vertrangspartner ausländischer Privatunternehmen (1971); *id.* Der Durchgriff auf den Staat (1972); KHADJAVI-GOUTARD–HAUSMANN: Zurechenbarkeit von Hoheitsakten und subsidiäre Staatshaftung bei Verträgen mit ausländischen Staatsunternehmen, Recht der Internationalen Wirtschaft (1980) 533; *id.*, Haftungsdurchgriff auf ausländische Staaten, Recht der Internationalen Wirtschaft (1983) 1 and Ress, Regierungskontrolle von öffentlichen (staatlichen und halbstaatlichen) Industrieunternehmen, in Festschrih für B.C.H. Aubin (1979) 129.

61 It is settled law in most countries that the *lex corporationis* is to be applied to all questions regarding a corporation's "internal affairs"—with respect to English law, *see* for example DICEY, A. V.–MORRIS, S.: The Conflict of Laws (11th ed.), (1987) 1128–1136 and to American law, Scoles & Hay, Conflict of Laws, (1982) 883–896. These affairs include essentially those acts that do not in and of themselves implicate third parties. Thus, the status of a corporation (i.e. whether it is duly and validly incorporated), the rights and liabilities of its directors, officers and shareholders, the validity of its stock issues and by-laws, the election of directors and appointment of management, the declaration of dividends and dissolution are determined by the *lex corporationis*. The application of the *lex corporationis* to these issues means that even if a company incorporated in one foreign country conducts all its activities in other countries, the law of the country of incorporation will nevertheless e applied to resolve disputes related to the "internal affairs" of the company. The eason for such a rule becomes obvious when one considers the ramifications of a different one. It would hardly be practical for the rights and obligations of directors officers and shareholders, for example, to vary depending on the law of each such individuals domicile. As explained by one American scholar: *"The need for unity applies to such*

legal existence, this separation of the enterprise from the owner should be respected. This basic rule also applies to state owned enterprises. It is part of the sovereignty of every state to decide that for certain activities in which the state wishes to engage it may create an enterprise with separate legal personality thereby creating the traditional legal consequences of such separation. However, problems arise when actions are taken by the state which may be characterized as an abuse of the separate legal personality or which may be said to militate against *bona fide* treatment of the separate legal entity.

Under Soviet law, the separate legal existence of FTOs is firmly rooted. Article 564 of the RSFSR Civil Code stipulates that the legal capacity of foreign legal entities is determined by the law according to which the legal entity was created. This is the traditional formulation of *lex corporationis*, which is accepted in most countries.[62] Consequently, the legal characteristics of a legal entity created on the basis of Soviet law are determined by such law. Article 33 of the RSFSR Civil Code provides that the state is not responsible for the obligations of state enterprises and such enterprises are not responsible for the obligations of the state. No cases are known under Soviet law where a Soviet court or arbitral tribunal has pierced the corporate veil of a state enterprise, or other state organization. Therefore, it seems highly unlikely that a Western creditor would be successful in trying to execute on state property located on the territory of the Russian Federation other than that which belongs to the FTO, or the joint stock company, against which the award was rendered.

(ii) Major legal systems

Since many FTOs, and other state entities own property located abroad against which execution may—as a matter of principle—be levied, it is necessary to look briefly at some major legal systems in the West with a view to determining to what extent it could be possible to pierce the corporate veil of FTOs, and other state entities in such jurisdictions. As the brief overwiev below will show, the circumstances under which the corporate veil

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matters as the stockholder's right to dividends, his right to participate in the management of the corporation by voting at stockholders meeting or otherwise, his liability on unpaid subscriptions, his subjection to assessments or double liability by reason of his being a shareholder, the existence and nature of possible preemptive rights in other stock or the properties of the corporation, and every other relations right and duty which grows out of the fact of his being a stockholder", LEFLAR, American Conflicts Law (3rd ed.), (1971) 503.4

62 Generally speaking, the *lex corporationis* may be either the law of the country were the entity in question was incorporated, provided incorporation is required for creation of the entity, the law of the country where the management of the entity is domiciled or the law of the country where the main activities of the entity are carried out. With respect to foreign entities, Russian law takes the position that the *lex corporationis* of such entities is the law of the country where the entity in question was established.—Art. 564. second paragraph, of the RSFSR Civil Code reads: *"When effecting a transaction in the course of foreign trade, and the accounting, insurance and other operations connected with it, the civil law capacity of foreign enterprises and organizations is governed by the law of the country where the enterprise or organisation is established."*—For a discussion of Soviet law as lex corporationis, see HOBÉR, K.: Choice of Law and Joint Ventures in the Soviet Union, in F.J.M. Feldbrugge (ed.) The Emancipation of Soviet Law (1992) 120–124.

may be pierced vary. Generally speaking, however, it would seem to be clear that a legal entity's separate status may be disregarded only under exceptional circumstances. Consequently, it will be difficult to convince Western courts to disregard the separate legal status of Russian entities. Western parties seeking to pierce the corporate veil of Russian entities will—it is submitted—find valuable general guidance for structuring their arguments in the following pronouncement made by the International Court of Justice in the so-called Barcelona Traction case:

> "Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were intended to serve; sometimes the corporate entity has been unable to protect the rights of those who have entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as those outside who have dealings with it... It is in this context that the process of 'lifting the corporate veil' or 'disregarding the legal entity' has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice in municipal law indicates that the veil is lifted, for instance, to prevent misuse of the privileges of the corporate personality, as in certain cases of fraud or malfeasance, to protect third persons... or to prevent the evasion of legal requirements or responsibilities."[63]

1. The United States

In 1983 the US Supreme Court decided the so-called *Bancec case (First National City Bank v. Banco para el Comercio Exterior de Cuba).*[64] Prior to this case the US Supreme Court had never addressed the issue of the separate corporate status of foreign government entities. In the Bancec case the Supreme Court broke from the position traditionally taken by US courts with respect to the legal status accorded government corporations from socialist countries and pierced the corporate veil of a Cuban FTO. The facts and holding of the Bancec case are as follows.[65]

By 1960, First National City Bank ("Citibank") had established banking branch offices in Cuba. Citibank issued Banco Para El Commercio De Cuba ("Bancec"), an

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63 Case Concerning Barcelona Traction Light Power Co. (Belgium v. Spain) 1970 ICJ, 3. *See* also Böckstiegel, Arbitration and State Enterprises. Survey on the National and International State of Law and Practice (1984) 41–48. (This section discusses suggested principles for lifting the corporate veil.)

64 102 S. Ct. 2591 (1983).—For comments on the case *see* e.g. Case note, The Liability of Foreign Government Entities: First National City Bank v. Banco Para El Comercio Exterior de Cuba, Boston College International & Comparative Law Review, Vol. III, No. 1 (1984) 127-149 and Case Note, Piercing the Veil of Foreign Trade Organizations, Columbia Journal of Transnational Law, Vol. 23, No. 2 (1985) 483–496.

65 The account below is based on the case report referred to in note 7, *supra.*

official, autonomous credit institution for foreign trade with full legal capacity of its own, an irrevocable letter of credit in connection with the sale of sugar by Bancec to a Canadian corporation. After delivery, all Citibank assets were seized and nationalized by the Cuban Government, through Cuba's national bank, Banco Nacional ("Banco"). When Bancec sought to collect on the letter of credit, Citibank refused payment, opting to credit the amount against losses from the Cuban nationalization. Bancec then brought suit in U.S. Federal Court. Shortly thereafter, the Cuban government dissolved Bancec, and the claim against Citibank eventually devolved to Banco. Throughout the nearly 20 year legal battle that ensued, Citibank sought to set off its Cuban losses from plaintiff's letter of credit. After the Federal Appeals Court refused to allow Citibanks counterclaim, the United States Supreme Court agreed to examine the ability of Citibank to offset losses incurred at the hands Cuba, in a lawsuit brought by its independent instrumentality.

The Court began its analysis by recognizing and reaffirming the independent status of FTOs characterizing them as independent of the state establishing it, and as such conferred with unique characteristics, such as the right to sue and be sued. In this way, it is similar to a corporation, whose identity and existence is separate from its shareholders. As a shareholder's illegal behavior would rarely make a corporation liable for suit, so too government illegality will not usually affect an FTO. The Bancec case created a judicial exception to this rule when it held that Cuba's seizure of Citibank assets allowed Citibank to offset its loss against Bancec's claim for lack of payment under the letter of credit.

In so holding, the Court essentially analyzed the situation under equitable principles of corporate law, and first observed that:

> "limited liability for governmental instrumentalities is the rule, not the exception and great deference should be accorded government instrumentalities established as juridical entities. However, as with private corporations, if an entity is so extensively controlled by its owner that a relationship of principal and agent is created, one may be held liable for the acts of the other".[66]

When Bancec was dissolved, the claim devolved to Banco. The fact that Banco coordinated the seizure of Citibank assets upon the orders of the Cuban Parliament demonstrated to the Court that Banco was the agent of the Cuban Government. As Cuba's agent the Court reasoned that any recovery by Banco would be of primary benefit to Cuba, and thus Cuba should be accountable for Banco's illegal taking of Citibank property. As the primary beneficiary to Banco's recovery, the Court held that it would be inequitable to essentially allow Cuba to recover on a claim while avoiding responsibility for its actions. Cuba's transfer of the claim to Banco was also recognized as inequitable by the court:

66 102 S. Ct. 2591 (1983) at 619.

> "[There exists] the broader equitable principal that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice."[67]

When the Supreme Court rendered its decision in the Bancec case, it was unclear how broadly U.S. courts would interpret the ruling. Critics charged that the holding, based almost entirely on equitable principles of fairness, would create a barrage of previously excluded claims. However, in the nine years since the Bancec case, only a few cases have dealt with the subject, and all but one has refused to hold a government instrumentality liable for government action. These cases are an instructive guide to what courts will deem dispositive in ruling on similar claims.

In *Lettelier* v. *The Republic of Chile*,[68] the Second Circuit Court of Appeals considered the issue of whether a judgment against the Chilean Government made its national airline amenable to execution. In *Lettelier*, numerous judgment creditors sought to enforce a lower court's judgment against the Republic of Chile by seizing an airplane owned by Linea Area Nacional, Chile's national airline ("Linea"). The District Court allowed the seizure, finding that adherence to the airline's separate corporate entity would violate the equitable principles enunciated in the Bancec case.

In reversing the District Court, the Court of Appeals noted that Linea's peripheral participation in the actions leading to the claim did not amount to an abuse of Linea's corporate form; Chilean government agents were able to use the airline in the execution of the tortious act upon which the Plaintiffs brought suit. However, the court felt that this contact between Linea and Chile did not amount to the overwhelming governmental control seen in the Bancec case, as there was no evidence that Linea's separate juridical status was established to shield its owners from liability for their actions, or that Chile ignored ordinary corporate formalities in the operation of the airline.

The holding in *Lettelier* is important because it confirms the Supreme Court's mandate that separate corporate existence is a presumption which should not easily be overcome; to be overcome a closer connection between instrumentality and State was needed, as when a corporation is run as the alter ego of its owner.

The importance of alter ego analysis was explored in *Hester International v. The Republic of Nigeria*.[69] In *Hester*, an American corporation (Hester) entered into a rice supply operation with a Nigerian company. When the operation failed, Hester filed suit in U.S. Federal Court, claiming that the Nigerian party caused the operation to fail. Hester named the Nigerian Government as a co-defendant, reasoning that the Nigerian party was the alter ego of the Government and thus the Government was legally responsible for the operation's failure.

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67 *Id.*, at 629.
68 488 F. Supp. 665 (D.D.C. 1980).
69 879 F. 2d. 170 (5th Cir. 1989).

In dismissing Nigeria as a party to the suit, the Court of Appeals first noted that Nigeria had never signed the agreement. Thus, for Nigeria to be held liable under the contract, there had to exist such an integrated relationship between it and the company that an obvious inequity would arise in denying liability. The court contrasted the facts of the case to those in *Kalamazoo v. Ethiopia.*[70] In *Kalamazoo*, the court decided whether or not Ethiopia's involvement in a domestic company was so extensive as to allow Kalamazoo's damages from Ethiopia's expropriation, which Kalamazoo sought to raise as a counterclaim in a suit by the domestic corporation.

Answering the question in the affirmative, the court in Kalamazoo noted the close factual similarities between that case and the Bancec case (i.e. government expropriation of defendant's property, a domestic plaintiff involved in the illegal government expropriation and defendants desire to set off government damage in the form of a counterclaim). After noting that Ethiopia had exerted direct control of the domestic company after taking defendant's capital holdings in the company, the court concluded:

> "[that] to continue to recognize the separate legal status of [the domestic company] would insulate the [Ethiopian Government] from liability for its expropriation of [defendants] property interest in [the domestic company], while permitting [Ethiopia], through [the domestic company], to profit from its commercial activities in the United States and to even assert a claim against [defendant] to recover payment for assets [the domestic company] sold in the country... The Court concludes that maintenance of the suit against [Ethiopia] does not offend traditional notions of fair play and substantial justice."[71]

Kalamazoo, as the only case where liability was imputed to the instrumentality, is striking given its almost exactly similar fact situation to that in the Bancec case. The fact that liability was imputed only in such a similar case further confirms that U.S. courts have been quite hesitant to create an exception to the general rule of separate identity for government instrumentalities.

Unlike *Kalamazoo*, the court in *Hester* concluded that the facts did not warrant a holding that the domestic corporation was so extensively controlled as to be an alter-ego of the government. This is significant because the Government owned 100% of the domestic corporation and solely appointed the members of the board of directors.

2. The United Kingdom

English courts follow a rule similar to the general rule in U.S. courts; English courts recognize the separate juridical status of foreign government entities. The English courts, however, have not deviated from this general rule, as indicated by the three English cases

70 616 F. Supp. 660 (W.D. Mich. 1985).
71 *Id.*, at 666.

cited by the U.S. Supreme Court in Bancec.[72] Although these cases do not involve a setoff, they do involve government entities with many of the same characteristics as the Cuban state trading corporation Bancec. For this reason, it is submitted that the cases are indicative of how English courts might handle similar issues, if and when they are confronted with them.

In *Trendtex Trading Corporation* v. *Central Bank of Nigeria*,[73] the court considered the relationship between the Central Bank of Nigeria, a government entity, and the Nigerian government. The Nigerian government had instituted import controls on cement to alleviate shipping congestion in Nigerian ports. Pursuant to these import controls, the Central Bank of Nigeria refused to honor its obligations under various irrevocable letters of credit to Trendtex, a Swiss corporation that was to supply the cement to an English trading company. One issue in the case was whether the Central Bank of Nigeria was an *alter ego* of the Nigerian government and therefore immune from suit under the doctrine of sovereign immunity.[74] The court of first instance found that the functions of the bank were essentially functions of the state of Nigeria and, for that reason, held that the bank was a department of the state and thus not a separate entity and therefore immune from suit in England.

The Court of Appeal, however, reversed this decision.[75] Lord Justice Stephenson found that the Central Bank of Nigeria Act established the bank as a separate entity, not as a government department. Since the bank had many of the duties of a bank and was capable of suing and being sued, Lord Justice Stephenson ruled that the bank was not a department of the Nigerian government but a separate entity and thus could not claim sovereign immunity.

Lord Justice Shaw concurred in this decision. He emphasized *that* the Nigerian government had established the bank as a separate entity, *that* the bank's functions were indicative of this separate status, *and that* those dealing with the bank would presume it was independent, and concluded that the bank was a separate entity from the government.

The English Court of Appeal reconsidered the relationship between a government entity and the government which created it in *C. Czarnikow Ltd.* v. *Centralia Handlu Zagranicznego Rolimpex*.[76] In this case, the Polish state enterprise Rolimpex contracted to sell sugar to C. Czarnikow Ltd., an English company. When the Polish Minister of

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72 The Supreme Court cited the three cases discussed below, i.e. *Trendtex*, *Rolimpex* and *I Congreso del Partido*, 102 S. Ct. at 2600, n. 18.

73 Trendtex (1977) 1 Q.B. at 560. The facts of the case described below are as set forth in the case report.

74 Generally speaking, questions concerning the possibility to pierce the corporate veil of state enterprises are intimately linked with state immunity considerations. This is particularly true with respect to Germany, France and Switzerland, *cf.* p. 52 *et seq.* This notwithstanding, immunity is treated separately below, in Section VI, since different considerations do after all apply.

75 Trendtex, 1977 1 Q.B. at 580.

76 Rolimpex, 1979 A.C. 351.–For comments on this case, *see eg.* BECKER, The Rolimpex Exit from International Contract Responsibility, 10 New York University Journal of International Law and Politics (1978), and LESSER, Rolimpex: A Sweet Solution to Legal Success, 128 New Law Journal (1978) 591.

Foreign Trade and Shipping banned the export of sugar, Rolimpex was unable to meet its contractual obligations. Rolimpex claimed that the *force majeure* clause in the contract, which excused performance if prevented by government intervention, released it from liability for nonperformance of the contract. The English company contended that because Rolimpex was a Polish state enterprise, the actions of the Polish government could not be separated from those of Rolimpex; therefore, the government intervention was not beyond the seller's control, as required for the *force majeure* clause to be effective. The court ruled, however, that Rolimpex and the Polish government were not the same entity and that Rolimpex could therefore rely on the *force majeure* clause.

The House of Lords affirmed the decision.[77] It considered that while Rolimpex was subject to the direction of a government minister, it did have a separate personality, making its own decisions on commercial activity, such as choosing with whom and on what terms to do business. The state treasury was not responsible for the financial obligations of Rolimpex, and Rolimpex was not responsible for those of the state.

Relying on these facts, the court ruled that Rolimpex and the Polish government were not so closely connected so as to preclude Rolimpex from relying on the sugar export ban by the government. Rolimpex was thus released from liability because of the *force majeure* clause. This decision demonstrates the desire English courts to respect the independent status of government entities.[78]

The most recent case dealing with the independent status of foreign government entities is *1° Congreso del Partido*.[79] This case concerned a contract for the sale of sugar between Cubazucar a Cuban trading enterprise, and Iansa, a Chilean company. Mambisa, another Cuban state trading enterprise, operated the ships which were to deliver the sugar. The Cuban government exercised overall direction and control over Cubazucar and Mambisa and provided the funds necessary for their operation. The trading companies, however, made their own decisions regarding day-to-day commercial matters. The court recognized that these companies were very similar to the Polish organization Rolimpex. When the Cuban government ordered that the contract not be performed because of its intense dislike of the new Chilean government, Iansa sued Mambisa and the Republic of Cuba.

The Admiralty Court held that it had no jurisdiction over Mambisa or the Republic of Cuba and therefore dismissed the actions.[80] Referring to Cubazucar and Mambisa, the court stated that they were examples of independent state enterprises found in both Western and socialist countries. The Court of Appeal affirmed the lower court's decision

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77 Rolimpex, 1979 A.C. at 373.

78 Rolimpex, 1979 A.C. at 361.

79 (1980) 1 Lloyds L.R. 23 (C.A.). For comments, *see* e.g. FOX, H.: State Immunity: The House of Lord's Decision in 1° Congreso del Partido, 98 L.Q. Rev. (1982) 94.

80 1° Congreso, (1978) 1 Q.B. at 533.

and agreed that Cubazucar and Mambisa were not departments of the Cuban government, but rather were independent entities.[81]

The House of Lords reversed the decision of the Court of Appeal and held that Cuba could not plead sovereign immunity.[82] It agreed, however, with the lower courts' treatment of the Cuban state enterprises. Lord Wilberforce stated:

> "State-controlled enterprises, with legal personality, ability to trade and to enter into contracts ofprivate law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. The distinction between them, and their governing state, may appear artificial; but it is an accepted distinction in the law of England and other states."[83]

Thus, while the various English courts disagreed on whether Cuba could plead sovereign immunity for actions having both political and commercial aspects, the courts did agree that these state trading entities should be considered independent from their governments.

Generally speaking, English courts, when faced with questions on the status of foreign government entibes, have demonstrated a policy of allowing such entities to maintain their autonomous status. Unlike the U.S. Supreme Court in *Bancec*, the English courts have not yet allowed the circumstances of a particular case to override this policy.

3. Germany

Since the Federal Constitutional Court's 1963 decision in the Iranian Embassy Casez,[84] it is undisputed that the Federal Republic follows the theory of restrictive immunity. Likewise, German courts continue to apply the separate entity rule.[85]

In the *Central Bank of Nigeria Cases*,[86] the plaintiff attached funds belonging to the bank in aid of a breach of contract claim based on a letter of credit. The bank pleaded immunity, arguing that its activities were regarded as sovereign under Nigerian law.

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81 1° Congreso, (1980) 1 Lloyds L.R. at 36.

82 1° Congreso, 1983 A.C. at 279.

83 *Id.* at 258.

84 Judgement dated 30 April 1963, 16 BVerfGE 27 (1964). This case—which arose out of repair works done at the Iranian Embassy in Germany—is still the leading case concerning the separate legal status of state entities, sovereign immunity and related matters. The court concluded, *inter alia*, *that* a foreign state is immune only for activities of a sovereign nature *and that* the character of a foreign state's activities must be determined under municipal law.

85 *See* e.g. ESSER, I.: Zur Immunität rechtlich selbständiger Staatsunternehmen, Recht der Internationalen Wirtschaft, (1984) 577, and MANN, F. A.: Staatsunternehmen in internationalen Handelsbeziehungen, Recht der Internationalen Wirtschaft (1987) 186.

86 Frankfurter Landgericht, decisions dated 2 December 1975 and 25 August 1976, 1976 NJW 1044; 65 ILR 131.

Applying German and international law, the court concluded that the bank was a separate legal entity, and went on to say:

> "The petitioner correctly points out that in accordance with general case law, legal publications and writings on international law, separate legal entities of a foreign state do not enjoy immunity."[87]

In *National Iranian Oil Co. Legal Status Case*,[88] the plaintiff obtained attachment orders and seized funds held in NIOC's name. NIOC appealed. The appellate court rejected NIOC's claim of sovereign immunity, emphasizing that NIOC had an independent legal personality and was concededly a commercial business enterprise whose shares were owned by Iran. The court then stated that under German and international law, "(c)ommercial undertakings of a foreign state which have been endowed with their own independent legal personality do not enjoy immunity".[89]

In a related case, *National Iranian Oil Co. Pipeline Contracts Case*,[90] the appellate court again applied the separate entity rule. The court stated that the property which had been seized was not state property, but that of the company; the fact that the state of Iran owned all the shares of the company was immaterial.[91] NIOC appealed to the Federal Constitutional Court, which affirmed this ruling, although on other grounds.

4. France

French courts today apply the separate entity rule and deny jurisdictional immunity to entities legally separate from a foreign state.[92] Similar rules apply to immunity from execution.[93] Generally speaking, the French separate entity rule functions as a presumption of non-immunity and, consistent with the theory of restrictive immunity, it is subject to an exception conferring immunity for sovereign acts.

In *Cameroon Development Bank v. Rolber*,[94] plaintiffs sued a bank owned by the state of Cameroon on bills of exchange that the state had issued and that the bank had guaranteed. The bank pleaded jurisdictional immunity, arguing that it had acted on behalf

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87 65 ILR at 134.

88 65 ILR at 199.

89 *Id.* at 202–203.

90 65 ILR at 212.

91 *Id.* at 213.

92 *See* e.g. Société Nationale des Transports Routiers (SNTR) v. Compagnie Algérienne de Transit, Judgment dated 19 March 1971, 1979 Bull. Cass. IV80, and Societé des Ets. Poclain & Cie d'Assurances la Concorde v. Morflot USSR, Judgment dated 1 February 1977, 1977 Droit Maritime Français 298.

93 *See* e.g. Société SONATRACH v. Migeon, Judgment dated 1 October 1985, 1986 R.C.D.I.P. 527, and Islamic Republic of Iran v. Société Eurodif, Judgment dated 14 March 1984, 1984. J.I.L. 598. For comments, *see* PAULSSON, Sovereign Immunity From Jurisdiction: French caselaw revisited, 19 Int'l. Law (1985) 277.

94 Banque Cameroanaise de dévelopement v. Société des etablissements, Rolber, Judgment dated 18 November 1986, 1987 R.C.D.I.P. 773.

of a foreign state. The Court of Appeal rejected the banks's plea of immunity. The bank appealed to the Court of Cassation.

The Court of Cassation affirmed the decision of the Court of Appeal. The bank argued that the Court of Appeal had denied immunity "without examining whether the bank was acting on behalf of a foreign state in the interests of a public service".[95] However, the Court of Cassation stated:

> "Whatever the transaction underlying the bill at issue, the guarantee given by the CDB on behalf of the State of the Cameroon, since it was for the benefit of a legal person governed by private law, constituted an ordinary commercial act *(acte de commerce)* performed in the normal exercise of the CDB's banking activities and quite unrelated to the exercise of public power *(puissance publique)*.[96]

Even if the issue of jurisdictional immunity turned on the question of whether the activity in question was commercial or sovereign in nature, the case demonstrates the unwillingness of French courts to pierce the corporate veil of state-owned enterprises.

5. Switzerland

Swiss courts have traditionally applied a classic separate entity rule turning strictly on legal personality.[97]

However, in *Banque Centrale de Turquie v. Weston*,[98] the Swiss Fecleral Tribunal declined to apply the separate entity rule, thereby casting doubt on the rule' s continued validity. In that case, a Turkish bank contracted to repay a loan made by Lloyds Bank through the Central Bank of the Republic of Turkey. Lloyds's assignee, Weston, attached the Central Bank's assets in Switzerland. The bank, which was fifty-one percent owned by Turkey, appealed a denial of its pleas for immunity from jurisdiction and execution.

The Federal Tribunal noted that a line of older cases had ruled that "entities with their own legal personality according to the law of their seat are not entitled to invoke immunity".[99] The court continued to say that this classical separate entity rule "certainly is not free from doubt", observing that modern law did not necessarily prohibit a court from disregarding the corporate personality.[100] However, the Federal Tribunal left the issue open because immunity was to be denied on other grounds.

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95 *Id.* at 774.

96 *Id.*

97 *See* e.g. GMÜR, F.: Zur Frage der gerichtlichen Immunität fremder Staaten und Staatsunternehmen, VII Schweizerisches Jahrbuch für Internationales Recht (1950) 9.

98 Banque Centrale de la République de Turquie v. Weston Compagnie de Finance et d'Investissement S. A., Judgment dated 15 November 1978, BGE 104 Ia 367.

99 *Id.* at 373.

100 *Id.*

In a more recent case, the Federal Tribunal revisited the issue left open and resolved it in lavor of the separate entity rule. In *Banco de la Nacion* v. *Banca Cattolica*,[101] the plaintiff sought attachment in Switzerland of funds belonging to a state-owned Peruvian bank. The court of first instance ordered the attachment. The bank appealed. The outcome turned squarely on the issue on whether immunity should be denied on the basis of the defendant's separate legal personality.

The Federal Tribunal in *Banco de la Nacion* applied the separate entity rule and, referring to the Weston case discussed above, concluded:

> "Thus, the view expressed in that case means that, as a general rule, organs with their own legal personality have no claim to state immunity, and that exceptions to this rule are conceivable only insofar as such entities have engaged in acts involving state power *(jure imperii)*.[102]

VI. Immunity

(i) General

The last hurdle that a Western businessman may have to overcome to execute an arbitral award against a Russian entity is immunity. The defense of-state immunity may typically be used by arguing that an FTC (or an FTO) which has been transformed into a joint stock company, is a state organization and that the property in its possession is state property and thus entitled to immunity. Immunity issues may also arise if the Western party has been successful in piercing the corporate veil of the FTO, and thus has, as a matter of principle, access to (all) property of the state; in such a situation the state may well raise the immunity defense.

As will be described below, the Soviet Union always adhered to the theory of absolute immunity,[103] as opposed to the theory of restrictive immunity.[104] Generally speaking,

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101 Banco de la Nacion, Lima v. Banca cattolica de Veneto, Judgment dated 21 March 1984, BGE 110 Ia 43.

102 *Id.* at 45–46.

103 *See* e.g. BOGUSLAVSKY, M. M.: Immunitet Gosudarstva (1962); *id.*, Staatliche Immunität (1965); *id.*, Mezhdunarodnoe chastnoe pravo (1989) 148–154, 178–182; KRYLOV: Mezhdunarodnoe chastnoe pravo (2nd ed. 1959) 197–206; LUNTS, L. A.: Mezhdunarodnoe chastnoe pravo, Osobennaia chast (1975) 77–91.

104 Stated in a general manner the theory of restrictive immunity rests on the distinction between *acta jure imperii* and *acta jure gestionis:* a state enjoys immunity only for the first category of acts. In other words: if a state engages in commercial acts *(acta jure gestionis)* it does not enjoy immunity with respect to such activities. Much of the debate during the last decades has focused on how to distinguish between these two categories of acts. Even though the principle of restrictive immunity has been easy to formulate, there have always been borderline cases confusing the picture.—The topic of sovereign immunity is vast and the modern literature overwhelming. Suffice it to refer to the following works of a general nature: Sucharitkul, State Immunities and Trading Activities in International Law (1959); SINCLAIR, I.: The Law of Sovereign Immunity Recent Developments, in Recueil des Cours (1980, II), 113–284; BADR: State Immunity. An analytical and prognostic view (1984); SCHREUER, Ch.: State Immunity: Some recent developments (1988); DAMIAN: Staatenimmunität und Gerichtszwang (1985).

absolute immunity requires the consent of the state in question before jurisdiction and/or execution may be had against it, or its property. Consequently, the traditional Soviet position with respect to state immunity has the potential of being a source of aggravation in foreign trade.

However, in practice this has not been the case, at least not since the Second World War. Indeed, discussion of immunity issues in Soviet foreign trade has typically been considered as an exercise reserved for the halls of academy. Even though Soviet lawyers have never at the theoretical level conceded that FTOs are precluded from pleading immunity, in practice immunity has frequently been waived by bilateral agreements or contractual provisions.[105] For example, the 1972 US–USSR Trade Agreement contained the following, fairly comprehensive waiver:

> "Foreign trade organizations of the USSR shall not claim or enjoy in the USA, and private natural and legal persons of the USA shall not claim or enjoy in the USSR, immunities from suit or execution of judgement or other liability with respect to commercial transactions."[106]

To the extent that such comprehensive waivers do not exist, immunity may present a problem, particularly when it comes to execution. Generally speaking, it has been long recognized that there exists a distinction between immunity from jurisdiction and immunity from execution, in so far as lack of immunity from jurisdiction does not necessarily entail lack of immunity from execution.[107]

Although state immunity was traditionally only an academic problem with respect to FTOs, since arbitral awards rendered against them were always fulfilled, the situation is changing because FTOs and other state entities engaged in foreign trade will in all likelihood find themselves in situations where they cannot fulfill such awards. It is quite possible that they will then try to plead immunity in an attempt to avoid execution on their property.

It is important to keep in mind that the theoretical foundation for absolute immunity in the case of the Soviet Union was primarily the then existing system of foreign trade, i.e. the state monopoly of foreign trade. The underlying philosophy was that the state

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105 Soviet treaty practice has by and large followed the theory of restrictive immunity, *see* e.g. Fourth Report by the Special Rapporteur to the International Law Commission. A/CN 4/357, Yearbook International Law Commission (1982 II, 1) 224.

106 66 Dep't State Bulletin 918 *et seq.* For a comment on the treaty *see* GRZYBOWSKY: United States–Soviet Union Trade Treaty of 1972, in Grzybowski (ed.), East–West Trade (1972) 3. It should be noted, however, that the Trade Agreement—which extended Most Favoured Nation status to the Soviet Union—never entered into force, because of the lack of political support in general and that of the U.S. legislature for such "unconditional" treatment as a Most Favoured Nation. *See* U.S. Dep't of Commerce, East–West Trade Update, 79–30 Overseas Business Rep. (1979) 16.

107 For a discussion of the rationale behind the distinction between immunity from jurisdiction and execution, *see* e.g. BADR: *op. cit.* at 107 et seq.

monopoly of foreign trade was but one expression of the economic role of the state in a socialist state. Furthermore, in a socialist state there was an objectively necessary unity between economic and political power, because socialist ownership of the means of production was the economic base of the state and constituted a distinctive feature of a socialist state. Under this theory, the economic activities of the state constitute an inherent component of exercising the sovereignty of a socialist state. Acceptance of the theory of restrictive immunity would thus—the argument continues—exclude the economic role of the state from the totality of its activity and thereby deprive the socialist state of one of its distinctive features. Therefore, the principle of state immunity must be universal with respect to a socialist state, i.e. encompassing all activities of such state.

If, and to what extent, exceptions from this universal principle of immunity are to be made can be determined only by the state itself.[108] It is clear that the traditional Soviet position on state immunity had political and ideological overtones. However, since the planned economy and the state monopoly of foreigh trade have now been abolished, this theoretical foundation for absolute sovereign immunity does not exist anymore. A consequence of this ought then to be that the Russian Federation should be more willing to accept the restrictive theory of state immunity, which—stated very generally—does not accept state immunity for commercial transactions (*acta gestionis*). So far, however, no official change in policy has been announced in this respect.[109]

(ii) State immunity in Soviet theory and practice[110]

Soviet theory is based on the idea of absolute state immunity. Underlying this theory is the assumption that the state, the sovereign, is always one: the state is always one single subject, although the manifestations of its legal personality may be manifold.

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108 *See* e.g. ENDERLEIN, F.: The Immunity of state property from foreign jurisdiction and execution: Doctrine and practice of the German Democratic Republic, Netherlands Yearbook of International Law (1979) 111.

109 It may be that a reorientation was being signalled in the 1991 Fundamentals of Civil Legislation of the USSR and the Republics. In Article 25:4 of the 1991 Fundamentals reference is made to a Law on State Immunity. As of yet no such law has been promulgated. The Fundamentals were adopted in May 1991 and scheduled to enter into force on 1 January 1992. However, as a result of the dissolution of the Soviet Union, this did not take place. Interestingly enough, the 1991 Fundamentals were reinstituted by a decision on 14 July 1992 by the Supreme Soviet of the Russian Federation (published on 24 July 1992 in Rossiiskaia Gazeta).

110 The following account is based on the sources referred to in note 1 *supra*, and, in addition, on: BOGUSLAVSKIJ, M. M.: Foreign State Immunity: Soviet Doctrine and Practice, Netherlands Yearbook of International Law (1979) 167; GUREEV: Prativopravnaia pozitsiia sudebnoi praktiki SShA v oblasti immuniteta gosudarstvennykh morskikh torgovykh sudov (The unlawful position of U.S. judicial practice in the area of immunity for state merchant ships) Soviet Yearbook International Law (1969) 934 and Kallistratova-Lesnitskaia-Puchinskii (eds.) Kommentarii k grazhdansko-protsessualnomu kodeksu RSFSR (Commentary on the RSFSR Code of Civil Procedure) (1976) 557.

For example, if a state concludes a contract with or makes a loan to another state, it does not thereby lose its sovereignty: it continues to act as a sovereign in the economic field.

Pursuant to Soviet doctrine the absolute theory of state immunity, means that no suit may be brought against a foreign state without its consent.

The consent of a state to a suit brought against it in the court of another state does not imply consent to the application of compulsory measures against it. Indeed, waiver of any applicable state immunity must be explicit, and may not be implied by conduct. This means that filing a suit is not tantamount to waiver of immunity from a counter-claim filed by the respondent. Furthermore, failure to plead immunity does not constitute a waiver of immunity. By giving immunity this rather broad interpretation, and thus granting foreign states appearing in Soviet courts extensive privileges, it was hoped that—on the basis of reciprocity—the Soviet State, and its entities, would enjoy similar privileges abroad.[111]

For the application of compulsory measures—whether provisional attachment or measures for the execution of judgements and arbitral awards, it is necessary to obtain an express consent of the defendant state in each specific case.

The application of the rules of immunity does not mean that disputes with a state may not be tried at all. A suit against a state may be brought in the state's own courts, and in the courts of another country, provided that consent of the defendant state is obtained. Where consent is not given, the plaintiff may apply to his own government to ask it to initiate diplomatic negotiations with the foreign state for resolution of the dispute in accordance with the principles of international law. In Soviet foreign trade practice, however, immunity from jurisdiction has very seldom been a problem, since Soviet FTOs have almost invariably included arbitration clauses in their contracts.

The distinction between *acta jure imperii* and *acta jure gestionis* underlying the restrictive theory of immunity, is characterized by Soviet lawyers as a dualistic approach dividing the law into "public" and "private" law, respectively.[112] Advocates of the absolute theory have suggested that the very assessment of a state act by a court of a foreign state has to be considered as a violation of sovereignty.[113] Therefore, they argue, the restrictive theory conflicts with the obligation to respect the sovereignty of a foreign state, and the principle of non-interference in the internal affairs of that state. Under this theory, it is a sovereign right of every state to determine the principles of the organization of its social and economic system, and these must be respected by other states. The socialist state, as a sovereign, is vested not only with political, but also with economic power, and because of this unity of political and economic leadership the socialist state itself fulfills economic activities. It is impossible to divide the socialist state into two subjects: a sovereign power and an entity subject to private law rules. As already

111 Cf. e.g. KALLISTRATOVA-LESNITSKAIA PUCHINSKII, *supra* note 8 at 557 and 560.
112 BOGUSLAVSKIJ, M. M.: *supra* note 8 at 169.
113 *Id.*

underlined, the approach is that the state is one, but the expressions of its activity are manifold. For example, in the official commentary to the RSFSR Civil Procedural Code, the following statement is made:

"Judicial immunity is not limited to instances where the foreign state fulfills acts of public administration. It applies also to relationships arising from private law acts of the state, in particular to commercial transactions concluded by the state."[114]

The principle of absolute immunity has been laid down in Soviet legislation. These rules became law with regard to foreign state property for the first time in a joint decree of the Central Executive Committee and the Council of People's Commissars of the USSR of 14 June 1929, "On the procedure for the seizure of and levy of execution on property belonging to a foreign state".[115] Article 1 of this Decree states that "the seizure of and levy of execution on property belonging to a foreign state, may be carried out only with the prior consent of the Council of People's Commissars in each specific case". This rule was subsequently included into the codes of Civil Procedure of the Republics forming part of the Soviet Union.

In 1961, this rule on immunity was included in the Fundamental Principles of Civil Procedure of the USSR and the Union Republics,[116] and repeated in Art. 435 of the RSFSR Civil Procedural Code, which reads:

"Bringing a suit against a foreign state, provisional attachment and the levy of execution against the property of a foreign state located in the USSR, is permitted only with the consent of the competent agencies of the state in question."[117]

According to the above-mentioned provision of Soviet municipal legislation, foreign state property enjoyed immunity in the USSR even in those cases in which it was in the possession or under the control, of a person not enjoying immunity itself. Immunity must be granted in all cases, regardless of what acts of a foreign state are under discussion, but the law does provide for the possibility of consent by the competent organs of the corresponding state to commencement of a suit, provisional attachment and execution.

However, Soviet theory emphasizes that consent to the commencement of a suit does not imply consent to provisional attachment or compulsory execution. Separate consent is required to perform of each of these acts. The commencement of a suit by a foreign state is not considered in Soviet theory as consent to a counter-claim being brought against it in the same litigation. The court is not entitled to accept such a counter-claim without the direct consent of the foreign state if it is the plaintiff in the main action.

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114 KALLISTRATOVA-LESNITSKAIA-PUCHINSKII, *supra* note 8 at 557 (my translation).

115 Sobranie zakonov SSR 1929, item 345.

116 Vedomosti Verkhovnogo Sovieta SSSR 1961, No. 50, item 526.

117 The RSFSR Code of Civil Procedure is translated in The Soviet Codes of Law (Simons ed.) 23 Law in Eastern Europe (1980) 543. The comments below on Art. 435 are based on KALLISTRATOVA-LESNITSKAIA-PUCHINSKII, *supra* note 8.

The legal status of Soviet state merchant vessels is often said to require separate treatment.[118] According to the provisions of Soviet legislation, merchant vessels are state property.[119] Because of this merchant vessels are allowed special status in the Merchant Shipping Code of the USSR. According to Article 20 of this Code no attachment or execution may be levied on vessels owned by the Soviet state without the consent of the Council of Ministers of the USSR. Thus, Soviet legislation embodies the principle of absolute immunity not only for warships but also for state merchant vessels. By contrast, on the internationai level it would seem generally accepted that state-owned ships—excluding war ships and other public ships—may be subject to arrest and execution with respect to maritime claims.[120] This follows primarily from the 1926 Brussels Convention for the Unification of Certain Rules concerning the Immunity of State-owned ships.[121] The Soviet Union never became a member of this convention. It did, however, accede to the other two leading conventions in this area, *viz.*, the Convention on the Territorial Sea and the Contigous Zone[122] and the Convention on the High Seas,[123] both adopted at the United Nations Conference on the Law of the Sea in Geneva, 1958. The USSR entered reservations to both conventions to the effect that all government ships enjoy immunity and that the consent of the flagstate is required before any execution measures may be taken with respect to such ships, thereby insisting on granting absolute immunity to state-owned merchant vessels.

From a legal point of view, it is not apparent why merchant vessels require separate treatment, since as a matter of principle all state property enjoys the same status under Soviet law. In other words, the state property which an FTO has under its operative management is not different from a merchant vessel. The explanation for the separate treatment of merchant vessels is probably a very pragmatic one: since merchant vessels are frequently located outside the borders of the Soviet Union, they are typically much more exposed to potential claims as well as arrest and execution orders from foreign courts than other forms of state property. Hence the perceived need to have separate provisions on merchant vessels as far as immunity is concerned.

The immunity of state merchant vessels under Soviet law does not mean that claims may not be made nor suits brought by foreign firms against such vessels. Claims may be made and suits brought, not against the Soviet state, as the owner of the vessel, but rather against the appropriate Soviet organization—typically a shipping company—in its capacity of "possessor" of the vessel. This attitude is explained by the fact that, state vessels, used for the carriage of goods, passengers, baggage and mail, are under the

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118 Cf. BOGUSLAVSKIJ, M. M.: *supra* note 8 at 172.

119 Art. 19 of the Merchant Shipping Code of the USSR reads: "Vessels in the USSR shall be in the ownership of the state or in the ownership of collective farms or other cooperative or social organizations". The Merchant Shipping Code is translated in The Soviet Codes of Law, *supra* note 14 at 1143.

120 *See* generally, THOMMEN: Legal Status of Merchant Ships in International Law (1962).

121 L.N.T.S. Vol. 176 (1937), No. 4062.

122 516 UNTS 205, Art. 20(1)–(2).

123 *Id.*

operative management of the Soviet organization in question.[124] Under Soviet law it is these organizations which are the "possessors" of the vessels. These organizations are separate legal entities and have independent financial accountability towards other organizations, including foreign organizations. The State, however, does not bear financial responsibility for the obligations of legal persons in such cases. Nevertheless, when a suit is brought, for example, against a Soviet shipping company, pursuant to Soviet law no attachment or execution may be levied on the vessel, by virtue of the principle of immunity, unless the consent of the Council of Ministers is obtained.

The above-mentioned principle of immunity of state merchant vessels has been laid down also in some international agreements concluded with socialist states. For example, in the Agreement on Co-operation in Maritime Merchant Shipping, of 3 December 1971, concluded between the Governments of Bulgaria, Hungary, the German Democratic Republic, Poland, Romania, the USSR and Czechoslovakia, it is provided that "state-owned merchant ships flying the flag of one of the Contracting Parties will not be subject to attachment or seizure in the ports of other Contracting Parties in connection with civil law disputes" between their agencies, organizations or maritime transport enterprises.[125]

A similar category of state property to that of merchant vessels is civil aircraft. It is similar because it is often located abroad within the reach of foreign courts, and because it typically represents significant values. Provisions on immunity in the area of civil aviation are found in the 1961 USSR Air Code,[126] Article 5 of which stipulates that all Soviet civil aircraft are state property, and thus enjoy absolute immunity. This means that no execution may take place against a Soviet aircraft, without the express consent of the USSR Council of Ministers. It should be noted that Aeroflot was not a separate legal entity under Soviet law, but rather a department of the then USSR Ministry of Civil Aviation, which was charged with the general supervision of all civil aircraft.[127]

(iii) Soviet entities before Western Courts

a. Introduction

Needless to say, depriving the suceessful party in an arbitration of the results of his labor by allowing immunity from execution creates a very unsatisfactory situation: the

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124 Article 4 of the Merchant Shipping Code stipulates, *inter alia*, that the shipping company "shall exercise the right of possession, use and disposition with regard to property transferred to its operational management ... on accordance with the goals of the shipping company, economic plan and designated use of the property in question."

125 *See* BOGUSLAVSKIJ, M. M.: *supra* note 8.

126 The USSR Air Code is translated in The Soviet Codes of Law (Simons, ed.) 23 Law in Eastern Europe (1980) 1073.

127 Article 5 USSR Air Code.

successful party has typically spent considerable time and money, including legal fees, in the arbitration, and is left with an unenforceable award. In most Western countries the theory of restrictive immunity has been accepted in so far as immunity from jurisdiction is concerned. The negative consequences referred to above notwithstanding, Western courts have generally been unwilling to deny immunity from execution, unless there is an express waiver. In fact, the generally held view is still that a distinction must be made between immunity from Jurisdiction and immunity from execution.[128] Stated generally, the rationale for this distinction is that execution, and other measures of constraint such as arrest and attachment, interfere more significantly with the sovereignty of a state than mere *participation* in litigation or arbitration.[129]

As has been indicated above, traditionally there have been no known cases where an FTQ has refused to fulfil its obligations under an arbitral award rendered against it. In recent times, however, there have been a number of situations where this has occurred and the Western party has tried to enforce the award, typically in the Russian Federation. As of present there are no reported cases from major Western jurisdictions concerning enforcement of arbitral awards against Russian entities. Guidance must then be sought in the statutory enactments of the Western jurisdiction in question and from (general) case law developed under such enactments.[130]

Generally speaking, in light of the Soviet theory of absolute immunity, relatively few cases in the West have dealt with the immunity of Soviet entities and organizations. This is to a large extent explained by the numerous bilateral treaties which have been signed by the Soviet Union. Generally, these treaties allow for suit being brought against state entities and also provide for enforcement of final judgments and awards.[131] In addition, virtually all contracts signed by FTOs contain arbitration clauses, which means that questions of immunity from jurisdiction never arise with respect to such contracts.

Over the years, however, there have been a number of cases dealing with the immunity of the Soviet Union and Soviet organizations. In France, for example, there is a string of cases before the Second World War known as the "Soviet cases" dealing with

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128 *See* e.g. CRAWFORD, J.: Execution of Judgments and Foreign Sovereign Immunity, AJIL 75 (1981) 854; METZGER: Immunity of Foreign State Property from Attachment or Execution in the USA, NYIL 10 (1979) 131, 136 and SINCLAIR, I.: The Law of Sovereign Immunity (1980) 218.

129 Even though pleas of immunity have occasionally been made before arbitral tribunals they are bound to fail—which is the case with all such pleas that have *de facto* been made—since there is nothing to be immune from. Participation in an arbitration does not involve submission so the exercise of state authority of another state: the arbitral tribunal is appointed on the basis of an agreement between the parties and the arbitrators do not—and cannot—exercise any state authority. Immunity issues may arise in the course of an arbitration, however, in so far as the parties seek the assistance of the courts of a particular jurisdiction. See generally BOUREL: Arbitrage international et immunités des Etats étrangers, Revue del' Arbitrage (1982) 119; DELAUME, G.: State Contracts and Transnational Arbitration, AJIL 75 (1981) 784; WETTER: Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals, Journal of International Arbitration 2 (1985) 7.

130 See p. 59 et seq. Infra.

131 See e.g. CRAWFORD, note 23 supra.

the immunity of the Soviet Trade Delegation in France.[132] The first case in this series of cases was *Société de Gostorg et la Représentation Commerciale de l'URSS* v. *Association France-Export*.[133] In that case the Cour de Cassation made a distinction between *acta jure gestionis* and *acta jure imperii* and allowed an attachment of the funds of the Trade Delegation.

In the United States there is a small number of cases dealing with the definition of agency or instrumentality under the Foreign Sovereign Immunities Act with respect to Soviet entities.[134] One case was against the Soviet press agencies TASS and Novosti.[135] TASS was characterized as an organ of the state while Novosti was regarded as an agency or instrumentality, primarily on the ground that the state owned 63 per cent of the properfy held by Novosti. In another case Intourist—the then state tourist organization of the Soviet Union—was classified as an agency or instrumentality.[136] In a rather unusual case, the Soviet Union was denied immunity on the basis of an alleged breach of international law, which is one of the exceptions from immunity provided by the Foreign Sovereign Immunities Act.[137] The case, *von Dardel* v. *USSR*[138] was brought for the unlawful seizure in 1945, imprisonment and possible death of the well-known Swedish diplomat Raoul Wallenberg.

In Germany, a recent case was brought against the USSR in the wake of the Chernobyl nuclear accident. In a claim for damages, immunity was denied, *inter alia*, on the ground that the operation of a nuclear plant is by nature a private act *(acta iure gestionis)*.[139]

As has been stated above, today most Western jurisdictions accept the theory of restrictive immunity, albeit approaches and case law differ. A Western company trying to enforce an award rendered against a Russian entity in the West must then carefully review the legislation and case law of the jurisdiction in question. Generally speaking, however, it would seem to be difficult for Russian entities to successfully invoke the theory of absolute immunity before Western courts.

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132 See REISCH: The Status of State Trading Entities in France, in Grzybowski (ed.) East-West Trade (1972) 188.

133 Judgment of 19 November 1926, (1929) D.P.I. 73, (1930) S. Jur. I. 49 (Cass. civ. Ire).

134 There are a number of U.S. Court cases prior to the adoption of the Foreign Sovereign Immunities Act in 1976, some of which deal with the attachment of Soviet merchant vessels. *See* GUREEV, supra note 110 and BOGUSLAVSKIJ, id., at 174–176.

135 Yessenin-Volpin v. Novosti Press Agency, Tass et al., 443 F. Supp. 849 (S.D.N.Y. 1978). In an earlier British case, Krajina v. The TASS Agency and Another (1949 2 All E.B. 274), TASS had been characterized as a department of the Soviet state, even though a separate legal entity under Soviet law, cf. Butler, Immunity of Soviet Juridical Persons, Modern Law Review XXXV (1972) 189.

136 Harris v. Intourist, 481 F. Supp. 1056 (E.D.N.Y. 1979).

137 *See* text, *infra*.

138 623 F. Sup. 246 (D.D.C. 1985).

139 Amtsgericht Bonn, reported in Neue Juristische Wochenschrift(1988) 1343 and decision by Landgericht Bonn, reported in Praxis der Internationalen Privat- und Verfahrensrecht (1988) 351. See generally, GÜNDLING, Rechtsschutz nach Tschernobyl, Praxis der Internationalen Privat- und Verfahrensrecht (1988) 338.

Below follows a brief overview of some major legal systems in the West, as far as immunity from execution is concerned. The overview is general in character and does not address all the specific issues which may arise in this connection, such as applicable law, waiver of immunity and the distinction made in certain jurisdictions between enforcement proceedings and execution proceedings.[140] Yet another issue not specifically addressed below is pre-judgment attachment. In practice, pre-judgment attachment is often crucial since it secures, or attempts to secure, assets which may eventually serve as objects of execution. Generally speaking, traditional case law in the West did not distinguish between pre-judgment attachment and execution. More recent codifications of state immunity, however, for example in the United States and the United Kingdom, prescribe more stringent requirements for pre-judgment attachment, presumably on the basis that courts typically have to take decisions of this nature without having entered into a thorough examination of the case on its merits, a fact which in turn increases the risk of frivolous arrests.

b. Major legal systems:

1. The United States

In the United States Section 1610 of the Foreign Sovereign Immunities Act contains a general rule of immunity from execution for the property of a foreign state.[141] The general rule is then qualified by a number of exceptions in Sections 1610 and 1611.[142]

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140 Questions of applicable law may for example arise in connection with the classification of transactions as commercial or non-commercial and the determination of the legal status of state entities. With respect to the first issue German courts seem to have consistently applied lex fori, see e.g. SCHRUEUER, supra note 104, at 33. Concerning the latter issue it would seem clear that the law of the entity's home state (lex corporationis) will play a decisive role.—Given the distinctions till made between immunity from jurisdiction and immunity from execution, many legal systems require an explicit waiver of immunity from execution. For a discussion of arbitration clauses as (general) waivers of immunity, see e.g. KAHALE, Arbitration and Choice-of-law clauses as waivers of jurisdictional immunity, 14 New York University Journal of International Law and Politics (1981) 29 and SULLIVAN, Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits, 18 Texas International Law Journal (1983) 329.—In some jurisdictions a distinction is made between immunity from jurisdiction in enforcement proceedings and immunity from actual execution measures. In the LIAMCO-case, for example, the Swedish Svea Court of Appeal—which is the court of first instance in enforcement proceedings under the New York Convention—refused to grant immunity to the Libyan party in the enforcement proceedings. However, this does not automatically mean that the arbitration clause in question would suffice as a waiver of immunity from execution, see e.g. Arbitration in Sweden (2nd rev. ed.) (1984) 18–20.

141 Section 1609 reads:

"Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter."

142 Section 1610 reads:

"(a) The property in the United Sates of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon Judgment entered by a court of the United States or of a State after the effective date of this Act, if—

applies, property used for a commercial activity in the United States may be subject to execution. Other exceptions include waiver of immunity, property taken in violation of international law and immovable property located in the United States. It is noteworthy that execution on commercial property presupposes that the property is, or was, used for the commercial activity on which the claim is based. However, it remains to be clarified what the nature and degree of this link must be to allow execution on the property.

It is also important to remember that all exceptions from immunity mentioned in the Act relate only to commercial property. Consequently, also the waiver exception may be applied only if the waiver relates to commercial property.

Under the Act execution against agencies and instrumentalities of a foreign state is more liberal than execution against the state itself. Only property located in the United States of an agency or instrumentality which engages in commercial activity in the United States may be subject to execution, provided that the claim relates to an activity for which the agency or instrumentality does not enjoy immunity from jurisdiction.[143] In this connection no distinction is made between commercial and non-commercial property; in other words also non-commercial property of the agency or instrumentality may be subject to execution. However, it is only the property of the agency or instrumentality in question which may be subject to execution, not that of another agency, or of the State itself.[144]

2. The United Kingdom

Under the rather complex structure of the British State Immunity Act of 1978, it is Section 13 which contains the relevant provisions.[145] The Act allows enforcement of

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(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consist of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into Judgment.

143 See subsection (b) of Section 1610.

144 This follows implicitly from the language of Section 1610 (b). See also House Report, ILM 15 (1976) 1474. On the other hand this presupposes that it has not been possible to pierce the corporate veil of the agency or instrumentality, see discussion on p. 47 et seq., supra.

145 Section 13 reads:

"(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

an arbitral award if there is a waiver, and also against property which is for the time being in use, or intended for use, for commercial purposes. Section 17(1)[146] defines "commercial purposes" by referring back to Section 3(3) of the Act, which contains the definition of "commercial transaction".[147] This concept is the English equivalent of *acta jure gestionis*, and has proved as difficult to apply in England as in other jurisdictions.[148]

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(2) Subject to subsections (3) and (4) below—
(a) relief shall not be given against a State by way of injunction order for specific performance or for the recovery of land or other property; and
(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
(4) Subsection (2) (b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended use for commercial purposes; but, in a case not falling within Section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if —
(a) the process is for enforcing a judgment which is final within the meaning of section 18 (1) (b) below and the State has made a declaration under Article 24 of the Convention; or
(b) the process is for enforcing an arbitration award.
(5) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.
(6) In the application of this section to Scotland—
(a) the reference to "injunction" shall be construed as a reference to "interdict";
(b) for paragraph (b) of subsection (2) above there shall be substituted the following paragraph—
(c) any reference to "process" shall be construed as a reference to "diligence", any reference to "the issue or any process" as a reference to "the doing of diligence" and the reference in subsection (4)(b) above to "an arbitral award" as a reference to "a decree arbitral"."

146 Section 17 reads:
"(1) In this Part of this Act—
'the Brussels Convention' means the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships signed in Brussels on 10th April 1926;
'commercial purposes' means purposes of such transactions or activities as are mentioned in section 3(3) above;
'ship' includes hovercraft."

147 Section 3(3) reads:
In this section "commercial transaction" means
(a) any contract for the supply of goods for services;
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
(c) any other transaction or activity (whether of a commercial, industrial, financial professional or other similar character) in to which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

148 See e.g. LEWIS, State and Diplomac Immunity (2nd ed. 1985) 55 et seq.

As far as separate legal entities are concerned, they are immune under the Act only with respect to activities performed in the exercise of sovereign authority.[149] To the extent that such entities do submit to jurisdiction with respect to sovereign activities, they will be granted the same immunity as the State itself.[150]

3. Germany

German courts have traditionally taken the view that separate legal entities do not enjoy immunity.[151] In so doing the courts rely heavily on the status of the entity. The theory of restrictive immunity has been applied both to immunity from jurisdiction and from execution. Furthermore, immunity from jurisdiction and from execution have been treated as interdependent concepts. In the Central Bank of Nigeria case the court said, *inter alia*:

"The restrictive immunity of the foreign state which applies to a suit on a debt in Germany applies also to the petition for a preliminary attachment which is sought by the petitioner. ... If exercise of jurisdiction is permissible, attachment of the local assets of a foreign state is also permissible."[152]

A general exemption is made for property dedicated to the public service of the foreign state in question. This issue was addressed in the famous Republic of the Philippines-case, in which the Federal Constitutional Court said *inter alia*:

"... there is no sufficiently general practice, supported by the necessary *opinio juris*, to establish a general rule of customary international law prohibiting the state of the forum absolutely from compulsory execution against the assets of a foreign state situated in the state of the forum".[153]

The case involved an attachment in execution of a default judgment against the Republic of the Philippines for unpaid rent. An attempt was made to attach funds in two bank accounts in the name of the Philippine Embassy. The funds were at least partly used for general Embassy purposes. The attempted attachment of the funds was declared void

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149 Section 14(2) reads:

"(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune."

150 This follows from Section 14(3) which reads:

"(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity."

151 *See*, for example the so-called Nigerian Cement case in which the Central Bank of Nigeria pleaded state immunity. *Central Bank of Nigeria*, Landgericht Frankfurt, decision of 2 December 1975, Neue Juristische Wochenschrift (1976) 1044.

152 *Id.*

153 In re Republic of the Philippines, 46 BVerfGE 342 (1977), reprinted in 38 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1978) 242.

because it was deemed impossible to investigate without interfering with the domestic affairs of the foreign state and its Embassy what proportion of the funds was actually used for sovereign purposes.[154]

The above-described attitude of German courts was confirmed in a series of cases against the National Iranian Oil Company (NIOC). In one of the cases the Oberlandesgericht in Frankfurt stated that "commercial undertakings of a foreign state which have been endorsed with their own independent legal personality do not enjoy any immunity".[155] In another case involving NIOC's bank accounts the Federal Constitutional Court held that the issue of immunity with respect to separate legal entities of a state did not need to be decided since the bank account in question would not have been immune even if the foreign state itself had been its holder, because the funds in the account were used for non-sovereign purposes.[156]

4. France

French case law prior to 1945 favored absolute immunity from execution, also when there was no immunity from jurisdiction.[157] Since then this position has been modified substantially, but is still not entirely clear.

Englander v. Statni Bank a Ceskoslovenska[158] involved execution against funds held by the Banque Commerciale pour l'Europe du Nord in the name of the Czechoslovakian State Bank. The Court of Appeal granted immunity, but the Court of Cassation did not accept the lower court's decision. It held that the mere *risk* of detriment to state property was not enough to uphold immunity. By contrast in *Clerget* v. *Representation Commerciale de la Republique dèmocratique du Vietnam*, the Court of Cassation stated that the funds in question could not be attached since their origin and destination had not been determined.[159]

In another case against an Algerian public pension fund the Court of Cassation did not focus on the designation of the funds involved, but rather on the nature of the funds

154 38 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1978) 275.

155 *Id.*, at 282.

156 National Iranian Oil Company Legal Status, 1980, Recht der internationalen Wirtschaft (1980) 26. For general comments on the cases involving NIOC see e.g. GRAMLICH, Staatliche Immunität und Zugriff auf iranische Konten in der Bundesrepublik, Neue Juristische Wochenschrift (1981) 2618, and STEINBERGER, Zur Rechtsprechung des Bundesverfassungsgerichtes zu Fragen der Immunität fremder Staaten, in Einigkeit und Recht und Freiheit, Festschrift für Carl Carstens, vol. 2 (1984) 889.

157 See 3 Répertoire de la pratique française en matière de droit international publique (1965) 191, 206, 210–210, 235. However, there is one notable exception viz., USSR v. Association France Export, reported in J. Droit Int'l (1929) 1042, where it was held that the USSR Trade Delegation's activities were commercial and where the Court of Cassation allowed attachment against the assets of the Trade Delegation, cf. note 30, supra.

158 96 J. Droit Int'L (1969) 923.

159 99 J. Droit Int'L (1972) 267.

as separate from those of the Algerian State itself.[160] Since the funds were separate, the pension fund was not entitled to immunity.

In the so-called Ipitrade-case in 1978, the Tribunal de Grande Instance held that Nigerian bank accounts in France enjoyed absolute immunity in connection with the execution of an arbitral award rendered in Switzerland, referring to the absolute character of immunity from execution enjoyed by the Federal Republic of Nigeria.[161] The same court has on two occasions vacated attachments against foreign state entities pending investigation of the precise purpose of the funds in question. One of these cases was the well-known LIAMCO-case.[162] In this case money owed to the Libyan Arab Republic was attached in satisfaction of an arbitral award. Libya and the Central Bank of Libya pleaded absolute immunity from execution for foreign states. In its decision the court said:

"Since no distinction could at the time be made between funds resulting from sovereign activities and those resulting from commercial activities the mere invocation of immunity was enough to justify lifting the attachments."[163]

In 1984 the Court of Cassation was again called upon to address issues of immunity from execution. The EURODIF-case involved prejudgment attachment of Iranian funds in France.[164] Attachment was granted by the court of first instance. The Court of Appeal, however, stated that Iran was entided to immunity from execution, since the funds attached were public funds to be transferred back to Iran for use at the discretion of the Iranian state. It went on to state that once the nature of the funds had been determined, it was not necessary to investigate whether the activity in question was sovereign or commercial. The Court of Cassation stated that the Court of Appeal should have determined the exact nature of the activities in question in order to deal with the question of immunity from execution. In discussing this issue, the Court of Cassation looked both at the nature of the funds in question and at the nature of the activity in question. The court held that immunity from execution is the main rule, but that exceptions must be made when the property against which execution is sought is intended to be used for the state's commercial activity on which the claim is based. In the opinion of the Court of Cassation the following three requirements must be met in order to deny immunity from execution:

— the activity of the state must be commercial, and
— the funds in question must have a commercial nature, and
— the funds must be used for the activity on which the claim is based.

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160 Caisse d'Assurance Vieillesse des Non-Salariés v. Caisse Nationaie des Barreaux Français, reported in 67 Rev. Critique Droit Int'l. Privé (1978) 532.

161 Ipitrade International SA v. Federal Republic of Nigeria, 106 J. Droit Int'l. (1979) 857.

162 Procureur de la Republique v. Société LIAMCO, 106 J. Droit Int'l (1979) 859. (The other case is Corporacion del Cobre v. Braden Copper Corporation, 100 J. Droit Int'l (1973) 227.)

163 *Id.* at 861.

164 EURODIF Corporation. Islamic Republic of Iran, reported in Semaine Juridique (1984) II, 20205.

5. Switzerland

Like so many other states Switzerland applies the theory of restrictive immunity, which practice is based on case law in the absence of statutory enactments. In other words, immunity may be enjoyed only for *acta jure imperii* and not for *acta jure gestionis*. In addition to the state itself, instrumentalities of the foreign state may enjoy immunity, provided they exercise sovereign authority.

Swiss courts—in contrast to the courts of many other countries—have consistently taken the position that there is no distinction between immunity from jurisdiction and immunity from execution. This means that if a state does not enjoy immunity from jurisdiction it is not entitled to immunity from execution either. The underlying philosophy is being that execution is the logical consequence of jurisdiction.[165] It should be emphasized however, that in practice the application of this principle is limited by the so-called *Binnenbeziehung* requirement, that is to say that there must be a territorial nexus between the legal relationship in question and Switzerland. The consequence of this requirement is that it is not enough to locate appropriate funds for execution in Switzerland. Sufficient territorial nexus would seem to exist if the contract on which the claim is based was signed in Switzerland or if it was wholly or panially performed there.[166] The requirement that there be a territorial nexus may in practice undoubtedly severely restrict the possibility to enforce an award on property, such as bank accounts, located in Switzerland. While it remains unclear what the reasons for this requirement are, it would seem likely that it is based on public policy considerations, in that the Swiss state is prepared to allow execution against foreign state property located in Switzerland only if there is a sufficient link to its territory. However, it is possible that the *Binnenbeziehung* requirement may not be applicable when an arbitral award is covered by the New York Convention.[167]

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165 This position has been taken by the Federal Tribunal in a series of cases, see e.g. Griechenland v. Julius Bär, 1956 BGE 82 I 75; United Arab Republic v. Mrs. X, 1960 BGE 86 I 23; Banque Centrale de la Republique de Turquie v. Weson Compagnie de Finance et d'Investissement SA 1978, BGE 104 Ia 367; Arab Republic of Egypt v. Cinetelevision International 1979, Sehn JIR 37 (1981) 206; Libya v. LIAMCO, 1980 BGE 106 Ia 142.

166 See e.g. BUCHER-TSCHANZ, International Arbitration in Switzerland (1989) 176.

167 *Id.* at 179; as pointed out therein, however, this issue does not appear to have been decided by the Federal Tribunal, as of yet.

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The Effect of the Dissolution of States on Treaty Obligations in Central and Eastern Europe

In the period following the Second World War an important number of new independent States were born and entered the international community as a consequence of the disintegration of colonial empires. In our days new States have come into being in the Central and East European region due to the dissolution of the Soviet Union, Czechoslovakia and Yugoslavia.[1]

These events have once again raised the question: how will the territorial changes of States affect the validity of international treaties concluded previously? The answer to this question is closely connected with two theoretical problems: the notion of the *identity of States* and that of the *succession of States.*

a) It is a well-known fact that international law does not propose any norms that would regulate the consequences of territorial changes with regard to the legal personality of the States concerned. The State subsisting with a diminished territory may aspire to being recognized as identical with the formerly existing one affected by the territorial change, while other parts, separated from the latter, form new States. Political considerations of the protagonists of international life (in the States concerned or in others) determine whether and how far the territorial modification of a State implies a change of its personality?

b) If a State becomes divided into several parts without the survival of the formerly existing State, the problem to be solved is that of State succession. This means the

1 For details see BEBLER, A.: Das Schicksal des kommunistischen Föderalismus. Sowjetunion, Tschechoslovakei und Jugoslavien im Vergleich. Europe Archiv, No. 47/13. 1992. pp. 375–386.

replacement of a State (predecessor State) by another (successor State) in the responsibility for the international relations of a territory. It is therefore evident that in this case also the problem of treaties previously concluded by the predecessor State is to be faced.

In the past there were no generally accepted customary rules in international law that would have attached legal consequences to the territorial changes of a State, no rules according to which the successor State would "inherit" in all cases and unconditionally—thus automatically—the rights and obligations of the predecessor State.

Although the Convention, adopted in Vienna in 1978 on State succession in respect of treaties has not come into force yet, we can examine—on the basis of experience gained in the course of the disintegration process of States in our region—the eventual impact of this Convention on the validity of previously concluded treaties.

Our examination will be limited to the problems of international treaties—without any attempt to outline here historical and political circumstances having generated this process.

1) The dissolution of the Soviet Union

On 8th December 1991, Belarus, the Russian Federation and the Ukraine founded in Minsk the *Commonwealth of Independent States*, and eight other republics joined this Community on 21st December 1991 in Alma-Ata. All these republics—with the exception of the Russian Federation—considered themselves continuations of the Soviet Union and declared their commitment to observe, in conformity with their constitutional rules, obligations deriving from international treaties and agreements concluded by the former Union of Soviet Socialist Republics.

When examining the consequences of the disintegration of the Soviet Union, we have to draw up a very nuanced picture. Clear distinctions have to be made, taking into account the differing situation in the different republics of the ex-USSR.[2]

a) The Russian Federation

This State declared to the UN its intention of "continuing" the membership of the Soviet Union in the Security Council and in the other organs and organizations of the United Nations system.[3] The maintenance of its right to membership—and to its permanent membership in the Security Council—was accepted by the international community. Evidently, political considerations connected with international security played a decisive role in this acceptance.[4]

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2 For details see: BOETHE, and M. SCHMIDT, Ch.: Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie. RGDIP 1992/4 pp. 811–842.

3 31. I. L. M. 138/1992.

4 See in this sense: TICHY, H.: Two recent cases of State succession. An Austrian Perspective, Austrian Y. Publ. Int. Law 44 (1992) p. 130.

As regards the continuous validity of international treaties, on January 13th, 1992 the Russian Federation informed the diplomatic representations accredited to Moscow about its intention of maintaining the validity of treaties concluded by the Soviet Union.

However, a distinction has to be made between multilateral and bilateral treaties.

The Secretary General of the UN, depository of a great number of treaties, simply made Russia figure in place of the Soviet Union in the register of these treaties.[5] Depositories of other treaties (e.g. the Swiss Federal Council) acted in the same way.[6]

Nevertheless, the validity of bilateral treaties is not automatically maintained in spite of the fact that the Russian Federation has been recognized by international organizations as the continuation of the Soviet Union. Negotiations are going on e.g. with Hungary and, to my knowledge, also Germany and Austria insist on the necessity of regularizing the situation.

b) Belarus and the Ukraine

These States are in a specific position: prior to the dissolution of the Soviet Union they had already possessed a limited legal personality which has become extended after the disintegration of the USSR. The treaties concluded by these two states—on their own behalf—before the dissolution of the Soviet Union are, without any doubt, still valid.

As to the other treaties concluded by the Soviet Union and applied earlier also on the territory of these two States, the succession problem is still to be solved.

Hungary e.g. was informed by Ukraine about the latter's intent to recognize the continuous validity of all treaties which are not contradictory to the constitution and interests of the Republic. Hungary is carrying on negotiations with both republics in the aim of regularizing by mutual agreements the future of treaties concluded with the ex-Soviet Union.

c) The Baltic States

These States regained their independence in August 1991—i.e. before the dissolution of the Soviet Union. They have declared themselves identical—in respect of international law—with the three States having been incorporated in 1940 by the Soviet Union as soviet republics.[7] It is a historical fact that an important number of States refused to recognize this annexation.

Consequently, the Baltic States have affirmed that the treaties concluded by the Soviet Union after 1940 are not valid with regard to them, while those which they had concluded before the annexation, i.e. before 1940, would be revitalized.

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5 See e.g.: Human Rights Journal. Vol. 14. No. 1–2. pp. 62–70.

6 CAHDI (92) 26. point 15.

7 For details see: La reconnaissance internationale des Etats Baltes. RDGIP 1992/4 pp. 843–872.

A very interesting position was taken in this respect by the Committee of Legal Advisers on International Public Law created within the Council of Europe: "The Baltic States should be dealt with in a pragmatic manner in order to avoid a different approach by those States which have not recognized the incorporation of the Baltic States into the Soviet Union (and therefore did not consider the Baltic States to be successor States to the Soviet Union) and other States, which had recognized this incorporation (and therefore did consider the Baltic States to be successor States to the Soviet Union). Consequently, for practical reasons, it would be preferable for States to accept that suitable treaties made by the Soviet Union should continue to apply to the Baltic States if these treaties were still suitable under the changed circumstances".[8]

Practice concerning treaty obligations has not yet crystallized. According to date we already possess, the Baltic States are still not being treated uniformly as successors of the Soviet Union. Independence regained after 51 years has not automatically led to the revitalization of all treaties concluded before 1940 between them and other States. At the same time, treaties concluded by the Soviet Union after 1940 may serve, in many cases, as a basis for negotiations aimed at clearing up their contractual ties.

d) The other republics

All the other republics—including Georgia which, initially, has not become a member of the Commonwealth of Independent States—are successors of the Soviet Union.

A meeting held in Moscow in 1992 with the aim of examining the problems of State succession proposed to draw up a list of bilateral and multilateral treaties concluded by the Soviet Union in order to facilitate for all republics to take a stand on the validity of these treaties.[9]

2) The dissolution of Czechoslovakia

This State was divided in two parts: the Czech Republic and the Slovak Republic are the successor States. Both have taken the same stand: in principle, they wish to maintain the validity of treaties concluded by the predecessor State—while reserving the right of carrying on negotiations with the parties concerned. Such is e.g. the case of Hungary.

3) The dissolution of Yugoslavia

This tragic case calls for studying both problems mentioned at the beginning of this paper: that of the identity and that of the succession of States.

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8 CAHDI 92/2 rev. point 30/e.

9 CI-DI-DEMO 92/1 pp. 4–5.

The Federal Republic of Yugoslavia, the so-called "Little Yugoslavia" (comprising Serbia and Montenegro), claims to maintain the international personality of former Yugoslavia. A letter expressing this viewpoint was sent by its government to the president of the Security Council. However, neither the other republics nor the great majority of the international community have recognized its identity with the former Yugoslav State. Having taken a position in the matter, the Security Council stated that the former Yugoslavia ceased to exist and the new Federal Republic has to apply for admission in the UN as a new State.[10]

The standpoint of many States refusing to recognize the identity of "Little Yugoslavia" with the former Yugoslav State has been motivated by political considerations: the Federal Republic of Yugoslavia asking its admission in the UN will have to prove that—in conformity with Article 4 of the Charter of the United Nations—it pursues a peaceful policy, that it has put an end to hostilities and re-established normal conditions.

In respect of treaty obligations, the problem has been clarified only in those republics where the situation has already become normalized. First of all in Slovenia and—to a certain measure—also in Croatia. These two States have made several declarations of succession concerning treaties concluded under the auspices of the UN.

As far as bilateral treaties are concerned, both States have notified their partners, e.g. Hungary, that they intend to become successors of the treaties concluded by ex-Yugoslavia, but this would not be automatic succession either. Negotiations are to be carried on with their partners in order to define the set of treaties which would remain in force.

Conclusions

1) Having surveyed the practice followed with regard to the future of international treaties in the States of the region affected by the disintegration process, we will examine this practice in the light of the Convention on the succession of States in respect of treaties.

Although this Convention is not yet in force, the practice followed by the States concerned seems to be in harmony with some of its dispositions.

We have to examine first of all whether and how far the main rule of Article 34 (1), "the principle of continuity" is being applied.

It could not be affirmed that all treaties of predecessor States have in actual fact remained valid with regard to successor States. Yet a clear trend can be observed in favour of the continuity of old treaties, even if this continuity is not automatically acknowledged, but is observed with the common consent of th e parties concerned.

It has to be mentioned in this respect that Article 34 (1) does not contain a rule claiming absolute validity. According to Article 34 (2) the principle of continuity does

10 Res. No. 777/1992. 31. I. L. M. pp. 1473–1474.

not apply if the parties concerned come to a different agreement (point a), or if the application of the treaty with respect to the successor States were incompatible with the object and purpose of the treaty, or would radically change the conditions for its execution (point b).

While a clear trend toward applying treaties in conformity with the principle of continuity can be observed in the states of the region, a distinction has to be made between treaties of general interest, those concluded between a limited number of states, and the bilateral ones.

a) With regard to treaties of general interest—especially those concluded under the auspices of international organizations of universal vocation—the practice followed in our region reveals a new feature as compared with the above-mentioned Convention. When the States concerned make a notification of their succession in order to be considered as parties to general conventions, Article 17 of the Convention is applied instead of Article 9, the former bearing on new, independent States which have come into existence as a result of decolonization. This implies that the keeping in force of old treaties by successor States does not require the consent of those States which are parties to the same conventions.

This new feature fully corresponds to the spirit of conventions of general interest adopted under the auspices of the UN—expressing the global interest of the international community. We have in mind first of all the conventions on the protection of human rights.

b) Treaties concluded between a limited number of States as well as bilateral treaties constitute a different case. Their validity can be maintained by the mutual consent of the parties.

2) More has to be said about regional treaties affected by the dissolution of several States in our region, especially about the 1948 Belgrade Convention on the regime of navigation on the Danube.

a) The Republic of Moldova, as one of the successor countries of the Soviet Union, applied for admission to the Convention. At the same time, in Ukraine's standpoint, the participation of the Republic of Moldova as a full-right member (i.e. as a riparian country) cannot be decided upon before Ukraine and Moldova come to an agreement on the demarcation and delimitation of boundaries between the two States: namely, when it will become clear that the Republic of Moldova fulfils the conditions stipulated in the disposals of Article 44 of the Belgrade Convention.

b) As to ex-Czechoslovakia, two successor States have to be taken into account, both having a different status with respect to the Belgrade Convention.

They have agreed on the succession of the Slovak Republic in the Belgrade Convention and on its participation in the Danube Commission. At the same time, the Czech Republic—although not a riparian country anymore—insists on participating in the Belgrade Convention as a successor State, referring to the fact that its territory is a part of the Danube water reservoir. Its interest in participating in the Convention seems to be well founded also in view of the plans aimed at the establishment of a European navigation system; according to these plans, the system would affect a part of its territory.

c) Croatia considers itself successor of Yugoslavia in the Belgrade Convention (and also depository of this State).

The Federal Republic of Yugoslavia—the so-called "Little Yugoslavia"—holds that Croatia cannot participate in the above-mentioned Convention in any capacity until boundaries are contested.

d) Taking into consideration all these controversial problems, a proposition has been made by several riparian States, according to which the Republic of Moldova, the Slovak Republic as well as the German Federal Republic should be allowed to participate with a "de facto" status in the work of the Danube Commission.

Without any doubt, the problems concerning the Danube Convention and the Danube Commission can be solved only with the common consent of all States concerned. At the same time, in my opinion, a more extensive international regulation will become necessary with the establishment of the European navigation system. Riparian States will not be the only ones interested in such a regulation; henceforth, the participation of two States which are not riparian countries anymore (the Russian Federation and the Czech Republic) have to be also reckoned with.

With regard to the future of other regional treaties, such as those concluded under the auspices of the ex-COMECON, this problem cannot be solved without the common agreement of the States concerned.

3) In summing up, it can be stated—on the basis of experience gained in the Central and East European region—that there is a clear trend towards maintaining contractual relations, even if sometimes occur some modifications. This assertion is valid in cases when, after the dissolution of a State, one of the parties identifies itself with the formerly existing State, but also in cases when all parts of the formerly existing State establish new, thus successor States. The States having maintained their identity with a diminished territory, are making efforts to adapt these treaties to the new circumstances. Not to break off contractual relations with the other States is in the interest of all successor States.

It is obvious that the restoration of peace and stability is the sine qua non condition of regularizing treaty obligations in the whole region.

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Liability for Nuclear Accidents Affecting the Environment

On 26 April 1986 the worst accident in the history of nuclear industry occurred at the Chernobyl nuclear power plant in the former USSR. According to the official reports the Chernobyl accident caused injuries to more than 200 plant and rescue workers, approximately 30 of them died within a short time.[1] The radioactive material released by the accident spread over the whole northern hemisphere, and contaminated large areas of land. Scientific investigations carried out prove that some effects of the radiation may develop a long time after the accident. Without entering into the statistical data one can state that the Chernobyl accident caused enormous and in some respect unmeasurable environmental damages. This accident proved the statement of a distinguished French scholar, René Rodière, made in the late 1950s, that "Les accidents dus à l'utilisation même pacifique de l'énergie atomique nous transportent dans un monde oú l'espace se trouve démesurement élargi et le temps extrêmement distendu".[2] It is well known that no compensation at all to States or victims abroad was paid either by the Soviet State or by the Soviet operator of the installation. I have to add that the USSR was not a contracting party to the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, which is the only treaty of a universal character regulating the liability for

1 Cf. GONZALEZ, Abel J.: The Radiological Health Consequences of Chernobyl. in: Nuclear Accidents, Liabilities and Guarantiees. OECD, Paris, 1993. p. 27.

2 RODIÈRE, René: Responsabilité civile et risque atomique. in: Aspects du droit de l'énergie atomique. Tome I. CNRS, Paris, 1965. p. 2.

nuclear damages.[3] Some victims suffering damages from the Chernobyl accident on the ground of general tort law brought actions against the Soviet operator both before their respective domestic courts (in Austria and Gemany) and before Soviet courts. However, these actions were unsuccessful, and they were dismissed, especially because the USSR was deemed to be the operator of the nuclear power plant and could invoke jurisdictional immunity.[4] It should be emphasised that had the Soviet Union been a party to the Vienna Convention on Civil Liability for Nuclear Damage at the time of the Chernobyl disaster and had it been possible for the victims to receive compensation by virtue of the Convention, compensation could have been paid to a very small fraction of the victims.[5]

The nuclear liability regime and the provisions of the Vienna Convention were rather modern and acceptable at the begining of the '60s, however, since that time nuclear industry developed, there is a wider use of radioactive materials and the number and capacity of nuclear installations increased. The need to revise the Vienna Convention has engaged the attention of experts for more than two decades, and, indeed it would be difficult even to enumerate the writings and conferences that have discussed the problems connected with the amendment of the Vienna Convention over the past decades, but before the Chernobyl disaster the States were reluctant to revise the Convention. Still the terrible tragedy of the Chernobyl accident must have occurred for international public opinion to finally arrive at an undestanding of the impossibility to delay the revision of the Vienna Convention. The tragedy of Chernobyl brought to light, *inter alia*, the following:

a) There are in operation across the world, and in some East-European countries, nuclear power plants which by reason of their type, pose greater than usual danger. The dangers arising from outmoded technologies are only increased by the failure of some of the countries involved to spend, for lack of funds, any significant amount of money on

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3 The Vienna Convention on Civil Liability for Nuclear Damage was concluded on 21 May 1963 and entered into force on 12 November 1977.

4 Cf. PELZER, Norbert: Inadequacies in the Civil Nuclear Liability Regime evident after the Chernobyl Accident: The Response in the Joint Protocol of 1988. in: Nuclear Accidents... p. 156.

5 The basic provisions of the Vienna Convention are the following:

a) no-fault and exclusive liability of the operator of the nuclear facility: i.e. the operator is liable to pay compensation for damages regardless of his culpability (Art. II and IV);

b) the limitation in time of the operator's liability, which is, in principle, ten years from the occurrence of the damage (Art. IV);

c) the limitation of the amount of liability to not less than 5 million US dollars for any one nuclear accident (Art. V, para. 1);

d) the liability is channelled onto one person, namely to the operator, meaning that the operator is exclusively liable to compensate for nuclear damage, regardless of whether the injury has been due to his activity or to that of a partner (Art. II, IV, X);

e) the duty of the operator to maintain, through insurance or other financial guarantees, financial security for the fulfilment of his financial obligations arising from his liability for nuclear damage (Art. VII);

f) the exclusive jurisdiction of the courts of site of the accident in all cases of claims based on the same accident (Art. IX, XIV).

the safety equipment of nuclear power plants. Moreover, the operators of many installations pay little attention to safety rules and often fail to observe them.

b) Under the rules of customary international law on State responsibility, foreign victims of a nuclear accident are practically unable to receive compensation for damage from the installation State.

c) Had the former Soviet Union been a party to the Vienna Convention at the time of the Chernobyl disaster and had it been possible for the victims to receive compensation by virtue of the Convention, compensation could have been paid to a very small fraction of the victims.

Shocked by the Chernobyl accident, the International Atomic Energy Agency General Conference and the Board of Governors put on the agenda the revision of the Vienna Convention and in the debates the prevailing view was that the existing nuclear liability regime, which was based on civil liability, should be revised and international state liability should be the keystone of the future system.[6] Pursuant to the Board's decision, a working group started to work late in May 1989. During the intervening period of over five years the governmental experts addressed the question of the revising the Vienna Convention as well as of improving and strengthening the existing regime of liability. At the negotiations the delegates have reached broad general agreement on the need to improve and strengthen the existing regime, however they hold widely differing views on what is to be understood by improving and strengthening the existing regime and how far to go in amending the Convention or what new provisions to insert in it.

It is well known that the whole regime of nuclear liability was developed on civil law basis and in the second half of the 50's the States started to regulate the liability of nuclear operators for nuclear damages.[7] Since that time the object of the regulations was to regulate the consequences of nuclear damages due to the nuclear activities of the operators in different countries and it was quite normal that the regulation was based on the rule of strict or "no-fault" liability already widely applied in the field of torts in municipal law of many countries.[8] Later on the States realized that nuclear damages could have transboundary effects and they elaborated the international conventions for nuclear damages, first the Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960)[9] and than the Vienna Convention on Civil Liability for Nuclear Damage (1963). These documents were based on the achievements and experiences of municipal laws and as a consequence they contained practically the same legal principles as the municipal laws on nuclear liability of different States. In these Conventions and

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6 Cf. IAEA, Gov/2306. p. 2.

7 Cf. DUPUY, Pierre-Marie: La résponsabilité international des états pour les dommages d'origine technologique et industrielle. Éditions A. Pedone, Paris, 1976. pp. 105-106.

8 Cf. LOPUSKI, Jan: Civil liability for nuclear damage: Selected questions connected with the revision of the Vienna Convention. in: Nuclear Accidents... p. 184.

9 Revised in 1964 and 1982, and supplemented by the Brussels Convention Supplementary to the Paris Convention of 29th July 1960 (1963).

in the municipal laws the nuclear third party liability was regulated as an ultra-hazardous activity, an objective "no-fault" liability with very limited possibilities of exonerations. According to commentators on the nuclear liability Conventions the established system was convenient both to the nuclear industry and to the potential victims, and these norms established a certain kind of equilibrum between their interests. As Professor Lopuski from Poland points out, a rational allocation of the risk is necessary in order not to stunt the technological progress and placing of the financial burden of full reparation of every consequences of a risk-creating activity on the person undertaking that activity, may delay the development of certain branches of industry where the technological progress is essential.[10] However, with the growing of nuclear industry the above-mentioned equilibrum have disappeared and the defenceless of the potential victims was increasing. Nowadays, because of the public fears about nuclear power, prospects for future growth in peaceful nuclear industry are seen to depend upon reassuring the public that nuclear power plants are safe, and that victims will be fully compensated in the event of an accident.[11]

It is sure that—in view of immence consequences of a nuclear accident[12]—the full compensation of the potential victims of a nuclear accident is impossible without the contribution of the State. This is reflected in the municipal law of different States, and practically in all legislations on nuclear third party liability the State assumes a certain kind of liability for nuclear damages, and above certain amount the State indemnifies.[13] Under the existing nuclear third party liability Conventions the compensation by the installation State is not excluded, and within the context of a civil liability arrangement, such as the Brussels Supplementary Convention at a certain level their is "State intervention", which means that in the case of damage beyond a certain amount the Brussels Supplemantary Convention requires payment of a second tier up to 175 million SDRs by the government of the liable operator. In the municipal law of different States we can found similar kind of "State interventions", which are voluntarily entered into obligation of States and thus subject to any stipulated limits and exceptions. That "State intervention" is completely different from the concept of international State liability what denotes an obligation of States to render full compensation upon the occurrence of a nuclear accident. The international State liability is a direct outgrowth of territorial

10 Cf. LOPUSKI, loc. cit. p. 185.

11 De La FAYETTE, Louise: Towards a New Regime of State Responsibility for Nuclear Activities. in: Nuclear Law Bulletin, 50. p. 14.

12 In this connection I wish to refer to the fact that after the Chernobyl accident according to the informations collected from various sectors of the European part of the Soviet Union showed that radioactive releases from the Chernobyl plant had an effect on radiation situation not only close to the plant but also at significant distances from it. Cf. ILYIN, L. A. and PAVLOVSKIJ, O. A.: Radiological consequences of the Chernobyl accident in the Soviet Union and measures taken to mitigate their impact. in: IAEA Bulletin, vol. 29, No. 4. p. 18.

13 See Third Party Liability, NEA, OCDE, Paris, 1990. p. 279.

sovereignty, an obligation encumbent upon States to ultimately guarantee the full compensation for nuclear damages.[14]

The major conceptual problem discussed at the Vienna talks were connected with the transformation of the existing civil liability regime to a system of State liability. Among the partisans of the State liability regime we can found very different States, there are some very poor developing countries as well as industralised States, like Australia, or Italy. Most of them are all so-called non-nuclear States.

The suggestions on the introduction of international State liability are completely in line with the fact that today, especially after the Chernobyl accident, the compensation of victims of nuclear accidents has become a primary concern and there are strong efforts to provide full compensation to the victims. The introduction of State liability would mean that the States are liable for the transboundary damages caused by dangerous activities excerted by private persons or companies on its territory. In connection with the introduction of State liability, we should not forget that nowadays there is no international instrument which stipulate the objective liability of the State for the transboundary damages caused by dangerous activities excerted by private persons on its territory. In this connection some authors try to refer on the analogy of the liability of States for space activities and the Antarctica treaty, however, this is not convincing because these treaties are providing State liability for State activity or activities under the supervision of the States.[15] The partisans of the principle of State liability for nuclear damages are emphasizing that the full compensation of victims, the unlimited liability in amount, the preventive efforts by States could be secured only by the introduction of State liability. At the negotiations in Vienna first of all the non-nuclear states are very much infavour of the introduction of State liability and there were often taken up proposals for introduction of elements of State liability in the Vienna Convention. This notwithstanding, the majority of delegates appear to oppose the inclusion of the principle of State liability in the Convention. With all probability the future system of the Vienna Convention would be based also on the civil liability regime, but—following the exemples of the municipal law of industralised Western countries and the Brussels Supplementary Convention—with some complementary elements of State intervention.

The on-going negotiations in Vienna are characterised by the effort to improve the situation of the victims. That can be seen in the extention of the territorial scope of the Convention, the extention of the notion of damage, the extention of time of limitation etc. However, it should not be forget that all these suggestions increase the number of the victims, or the number of those who are entitled for compensation. If we take into consideration that the nuclear liability regime is based on the *limited liability* of the oparators—irrespective of how high is the ceiling of the liability—the same amount of

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14 Cf. HANDL, Günther: Liability as an Obligation Established by a Primary Rule of International Law, in: Netherlands Yearbook of International Law. 1985. pp. 76–78.

15 See REYNERS, Patrick: Responsabilité objective des Etats en cas d'accident nucléaire. NUCLEAR INTERJURA'91 (Congrès de l'AIDN, Bath, 22–26 septembre 1991) (manuscript) p. 15.

money should be distributed to more victims, and as a consequence the situation of a victim as an individual is getting worsen. As Professor Pelzer from Germany points out by discussing the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention,[16] for the same cake we have more guests, and if there are more guests to eat from the cake there must be a bigger cake.[17]

The problem of State liability or civil liability and the question of environmental damages (or precisely the compensation for environmental damages) are very closely linked. During the last two decades an increasing concern for the environment has been established both nationally and internationally. And when we discuss the elaboration of a revised regime concerning liability and compensation for nuclear damage, problems related to the protection of the environment must be regarded as being of paramount importance. The Chernobyl accident proved that damage to the environment, economic loss, and costs of preventive measures and consequential losses are likely to constitute the major part of the damage following a nuclear accident.[18]

In the actual wording of the Vienna and the Paris Conventions for the coverage of damages to the environment the whole matter is leaved to national law.[19] The exposé des motifs on the Draft of the Vienna Convention says "...the question whether damage other than death, personal injury, loss of or damage to property give rise to civil liability, and the related questions of who may claim compensation, are left to the applicable national law. This concerns principally such items as moral damages and indirect damage or loss of profits. It does not appear necessary or indeed feasible to establish uniform international rules for such remedies".[20] In other words there is no restriction in Vienna Convention preventing the coverage under the Convention regime of damage to the environment, however, the Convention would not appear to require such coverage. This approach of the Convention challenges the principle of equal treatment of victims, since it would depend on the place of the incident and the law of the competent court whether, or at least to what extent, other loss or damage than death or personal injury or property

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16 The Joint Protocol was signed in 1988, it establishes a link between the two Conventions allowing victims of a nuclear accident in a Party to one of the Conventions to benefit from the compensation regime established by the other Convention and vice versa. It entered into force on 27 April, 1992. Despite their common basic principles, there existed no relationship between the Paris and the Vienna Conventions and both were operating in isolation from each other, as a consequence to some situations nether Convention applied, in other cases conflicts of law could arise. Cf. BOULANENKOV, V. and BRANDS, B.: Nuclear Liability: Status and prospects. in: IAEA Bulletin, vol. 30. No. 4. pp. 6–7.

17 See PELZER, Norbert: Inadequacies in the Civil Liability Regime Evident after the Chernobyl Accident: the Response in the Joint Protocol of 1988. In: Nuclear Accidents... op. cit. p. 167.

18 See OECD, NEA Aide-Memoire No. 2. International nuclear civil liability issues under discussion by the IAEA Standing Committee on Liability for Nuclear Damage. pp. 14–15.

19 See Art. I. k) (ii) of the Vienna Convention.

20 Civil Liability for Nuclear Damage, Official Records, International Conference, Vienna, 29 April–19 May 1963. IAEA, Vienna, 1964. p. 71.

damage would be compensated out of limited funds in case of an icident with trans-boundary effects.[21]

At the negotiations in Vienna the coverage of damages to the environment came to the surface in the context of the notion of nuclear damage. The delegates submitted several drafts concerning the notion of nuclear damage. Some proposals *expressis verbis* referred to the compensation of damages to environment (on that respect the most comprehensive was the proposal submitted by Australia)[22] other draft texts covered environmental damages only by implication. The majority of the delegations have emphasized that in some cases it is a problem the quantifiability of damage to the environment and thus it is unclear how the compensation for suth damages would operate in practice. They argued that environmental damage is not itself a damage to the property and these damages cannot be easily assessed in monetary terms, because e.g. the marine environment does not have a market value as such. An other question was who has *locus standi* in those cases, in other words who would be entitled to claim compensation for damage to the environment. The Standing Committee following the examples of other third party liability Conventions e.g. 1969 Convention on Civil Liability for Oil Pollution Damage and the 1971 Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, and the jurisprudence of some countries adopted as a draft Article the following:

"Nuclear damage" means:

(i) loss of life or personal injury;

(ii) loss of or damage to property;

(iii) loss of or damage by contamination to the environment, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;..."

It is regrettable that the Standing Committee leaved out the definition of the "impairment of the environment" despite the fact that Germany submitted a definition which reads as follow: "'Impairment of the environment' means a considerable and lasting adverse impact on nature and landscape by contamination." The above cited provisions mean that compensation for the impairment of the environment—other than loss of profit from such impairment—should be limited to costs of *reasonable measures of reinstatement*

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21 RUSTAND, H.: Updating the concept of damage, particularly as regards environmental damage and preventive measures, in the context of the ongoing negotiations on the revision of the Vienna Convention—some comparative aspects. in: Nuclear Accidents... p. 227.

22 Australia suggested that

"Nuclear damage" means—

(iii) loss of profit arising directly out of damage to the environment;

(iv) the cost of reasonable measures of reinstatement of the environment to the *status quo ante* actually undertaken or to be undertaken;

(v) damage to the environment within the limits of national jurisdiction of States other than the Installation State where there has been no reinstatement to the *status quo ante*.

actually undertaken or to be undertaken. According to a number of delegations with the use of the test of reasonableness it is possible to exclude abusive claims.

The compensation of the damages to the environment is more difficult and complicated than the above cited Article reflects and that provision does not resolve the problems of compensation too environmental damages. One of the difficulties lies in the fact that in connection with the environmental damages one can differentiate between three kinds of impairment of the environment. The first one is the impairment of the environment of private property that covers any area which may be subject to proprietary rights such as land, forest and, even some water areas; the other environmental damages are impairing those areas where States have sovereign rights like air space, territorial sea, but these are not subject of proprietary rights, and the third one is the impairment of areas beyond the jurisdiction of States, the *res communis omnium usus*, like the high sea, air space, etc. these areas are not property of anyone, damage to it falls outside the scope of third party liability regimes. According to Professor Lupuski from Poland it is not clear the relation between damage to the environment and damage to property, and whether the impairment of the environment of private property should be compensated under the heading "loss or damage to property" or as damge to the environment?[23] He holds the view that in the case of the impairment of the environment of private property the damage should be considered as damage to the property, and the compensable damage in that case would not be restricted to the costs of reinstatement measures but in accordance with general rules of the law of damages would cover the reduction in value of the property and the loss of profit caused by the impairment of the environment.[24]

It should be rocognised that this approach covers wider scope of environmental damages than the draft article elaborated by the Standing Committee, however, a great part of the environmental damages remain uncovered, since that will exclude form the scope of compensation the major environmental damages, because these could not be connected with any property or personal damage. And than the question rises whether the approach adopted by the delegates of the Standing Committee concerning the compensation for environmental damages is in conformity with Principle 22 of the Stockholm Declaration in which States pledged to co-operate to develop further international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction and control of states to areas beyond their jurisdiction.

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23 Cf. LOPUSKI, Jan: Liability for Nuclear Damage, an international perspective. National Atomic Energy Agency, Warsaw, 1993. p. 29.

24 Ibid. p. 30.

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Legal Aspects of Danube Waters Protection*

1. Introduction

This paper focuses on some specific issues of the legal regime for the protection of waters in a part of the Danube basin, namely, in the region of the former Socialist Federal Republic of Yugoslavia (SFRY), from the national and international aspects. It is an attempt at identifying the most important premises for the development of an international law regime of protection of the Danube basin waters, based on sustainable management of natural resources as the common heritage of mankind.

2. Protection of Waters in the Legal System of the SFRY

In the legal system of the SFRY, the protection of the Danube basin waters was regulated on the basis of federal regulations and those in force in the six republics and two provinces that made up the federation. The regulations brought at the level of the SFRY related to interstate and interrepublic watercourses and served to regulate the fundamentals of the regime of running, spring, underground and stagnant interrepublic waters of interest to two or more republics and the basic principles of international water regimes.

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The federation was responsible for making a classification of interstate and inter-republic watercourses according to their use and quality levels, while the competent republic and provincial authorities were responsible for categorization of watercourses according to the established classification and in line with international treaties. In addition, federal regulation ban the discharge of hazardous and harmful substances into the waters that are under the jurisdiction of the federation.

Federal legislation regulated several other legal aspects of the protection of waters as well as prohibition of water pollution by physical and legal persons, ban on the trade in sufficiently non-degradable substances, the enactment of specific measures against the pollution of water from ships, etc.

The regulation of the protection of the other waters in the Danube basin on the territory of the SFRY was within the jurisdiction of the republics and provinces—members of the federation. The monitoring of the quantitative and qualitative changes in the inter-republic and international watercourses was within the jurisdiction of several federal bodies, which however had no competence to act directly. This was so because the federal state had no instruments to directly implement its regulations, but rather the executive functions of the federation in the field of water protection were carried out through the administrative bodies of the republics and provinces. In practice, this type of organizations of the federal executive authority proved extremely inefficient, so that even in case of grave accidents of pollution in the Danube basin (for example, the Sava river) there was no adequate institutional response either in respect to identifying the causes of pollution and responsible polluters, or in regard to the elimination of the consequences of the pollution.

This institutional aspect, which was not adequately resolved in the legal system of the SFRY, due to disintegration of the SFRY and creation of new states in the part of Danube basin on that territory, attained international dimensions. In addition, for the time being no initiatives exist for starting negotiations on the regulations of these and other very important issues in respect to waters on the international level. Likewise, it may be noted that the legislation of these states relating to the protection of waters are mutually harmonized, at least in the scope within which the regulations of the republics and provinces within the SFRY were coordinated.

3. Protection of Waters in the Legal System of the FRY

The 1992 Constitution of the Federal Republic of Yugoslavia (FRY) establishes the state ownership of natural resources (waters included). This constitutional concept of state ownership over water resources needs a theoretical approach to define what kind of state ownership is the most appropriate. Namely, in a civil society, the role of the state in water administration (or management) could be defined as the role of the "trustee for its citizens", steward or guardian. This role is naturally rooted in the state's sovereignty over water resources, regardless of whether they are declared to be state ownership or a type of public domain or public ownership. But, this role of the state does not necessarily mean the obligatory implementation of the administrative instruments usually used in

ordinary, or classical, state functions (such as military or interior functions, or foreign relation functions etc.), i.e. ius imperium.

Taking on the role of a trustee, steward or guardian actually means surrendering the water administration to public control. This is basically what the principle "public-right-to-know" means. Moreover, this concept implies the wide involvement of the public and of the local autonomous bodies in the decision making process.

The rigid state concept of ownership over all natural resources, without including the democratic involvement of the public and local communities in the process of water administration and decision making process was characteristic for the former socialist states and is now characteristic for the newly born states on the territory of former Yugoslavia as well. The state's organs are now the key and only spiritus movens, using the supreme power in the name of the state (or in the name of people) and in the name of its citizens. This is why a theoretical elaboration of the state's ownership modalities is necessary. The ultimate goal is developing a theoretical water resources, law and administrative blueprint, suitable for modern civil society.

A careful analysis of the constitutional principles in the FRY indicates that the federal state is responsible for establishing the policy and adopting and implementing regulations which related to the protection of the watercourses which constitute boundaries or are intersected by the boundaries between the FRY and neighbour states.

In the FRY, the environmental protection policy was brought at the federal level and it contains the policy on the protection of waters, while the Law on Basic Principles of Environmental Protection and the Law on the Water Regime are under preparation. These laws will fully regulate all issues connected to the protection of waters, among others, those relating to the implementation of supranational law norms.

4. International Law Aspect

4.1. International agreements

When speaking of the international law aspect of the protection of the Danube basin waters, it should be noted that, up to now, no law binding international agreement or other act that exclusively regulates issues connected with the protection of waters have been concluded.[1] These questions have more or less been regulated by several international law documents which have as their basic subject other issues such as fishery or navigation.

1 An exception is true for a part of the Danube river basin, i.e. The Agreement on the River Tisza and its Tributaries Water Pollution Protection, signed 1986, between SFRY, Hungary, Czechoslovakia, Romania and USSR.

4.1.1. Agreement between the Governments of the Peoples Republic of Hungary and the Federal Peoples Republic of Yugoslavia on water management issues[2]

The Agreement states that its provisions relate to the protection of the boundary waters or watercourses intersected by state border against pollution.[3] A Joint commission was formed,[4] and its Statute being an integral part of the Agreement. On the VIII session of the Commission a Subcommission was formed to deal with water quality issues. The Subcommission has been active since 1966, periodically measuring the water quality of the Mura, Drava, Danube and Tisa rivers, evaluating the results, and assessing the tendencies of water quality changes. Within the activities of this Subcommission the States cooperate on preventing radioactive pollution, the pollution due to warming and accidental pollution.[5]

4.1.2. Agreement between the Government of the Federal Peoples Republic of Yugoslavia and the Romanian Peoples Republic on hydraulic systems and boundary watercourses or those intersected by states boundaries[6]

The Agreement deals with hydraulic issues, measures and functioning on the hydraulic systems, watercourses and valleys that form states boundaries or are intersected by states boundaries and which could influence the change of the water regime and quality.[7] A Joint Commission was formed under this Agreement. This Commission enacted a Code on its proceeding,[8] which was the legal ground[9] for the forming of the Subcommission for water quality.

It is within the jurisdiction of the Subcommission[10] to evaluate the results of the water quality measuring, made following the Declaration of the Danube basin countries on water management issues and especially on the protection of its waters against pollution, and following the Agreement on the river Tisa and its tributaries water protection against pollution, and those made under the jurisdiction of the Yugoslav–Romanian Commission for the Iron Gate hydraulic system.

2 Signed in Belgrade, on August 8th, 1955.

3 Art. 1.

4 Art. 4.

5 Jugoslovensko-Madarska komisija za vodoprivredu, pp. 109–114.

6 Signed in Bucharest, on April 7th, 1955.

7 Art. 1.

8 Enacted at the First session of the Joint Commission, held from March 11–18, 1956.

9 Art. 7.

10 Set up by the Yugoslav delegation's president, 1990.

4.1.3. Agreement on fishery in the Danube waters, signed between the Federal Republic of Yugoslavia, the Peoples Republic of Bulgaria, the Romanian Peoples Republic and the USSR[11]

According to the Agreement, the member parties will analyze all the sources of pollution as well as activities on the protection of the Danube waters against pollution by industrial and municipal waste waters and other dangerous substances discharged into this river, which could be dangerous for fishes and other aquatic organisms.[12]

The Danube waters, which this tripartite Agreement bears upon to, embrace the estuary and the tributaries influenced by the waters of the Danube, lakes, deserted river beds, permanently or temporarily connected with the Danube as well the alluvium plains of the Danube river.[13]

4.1.4. The Convention on the Danube navigation regime[14]

In this Convention there are no provisions pertaining to water protection. However, the Danube Commission, set up to implement the Convention, launched its Recommendations on the water pollution control of the Danube caused by the navigation.[15]

The Recommendations deal with the protection of the Danube waterways and waters in the Danubian ports and other unloading and loading locations.[16] Newly built vessels, and those that are repaired and modernized have to meet the requirements stated in the Recommendations. Technical equipment must be available to prevent water pollution by oils, and/or waste waters.[17]

The proposed measures state that it is forbidden to throw, release or discharge in any form objects, substances or oil products which could thwart or endanger navigation or pollute waters. All kinds of litter should be stored on board and unloaded in special port installations or incinerated.[18]

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11 Signed in Bucharest, on January 29th, 1958.

12 Art. 7.

13 Art. 3.

14 The Convention was signed in Belgrade on August 18th, 1948, between the USSR, the Peoples Republic of Bulgaria, the Hungarian Republic, the Romanian Peoples Republic, the Ukraine Soviet Socialist Republic, the Czechoslovakian Republic and the Federal Peoples Republic of Yugoslavia.

15 Doc. CD/SES 44/23.

Approved by the decision made on the 54th session on April 21st, 1968.

The Recommendations are based on the documents of the Danube Commission, on the opinions, regulations and provisions of the Danube basin countries, on documents of the working group for transport by waterways of the Inland Transport Committee of the UN ECE, relating to the water pollution control in waterways caused by navigation.—Resolution No. 21 and its annexes I and III—TRANS/SC 107, Annex 1.

16 Art. 1.1.1.

17 Art. 1.1.2.

18 Art. 2.1.

Although an attempt was made by the federal Law on interrepublic and interstate waters[19] to regulate several issues of this kind, it must be seen only as an initial positive impulse, later not supported by the participation of the SFRY in the Danube Commission Recommendations on the water pollution control of Danube river waters caused by the navigation.[20]

4.1.5. Agreement on the River Tisza and its Tributaries

Protection Against Pollution Signed Between the Governments of the SFRY, Czechoslovakia, Hungary, Romania and the USSR[21]

In this Agreement there are several obligations which the States have to fulfil. They should:

1) bring their programs into accord and implement a uniform monitoring program and methodology for conducting water quality analysis and evaluating the state and changes of the water quality of the river Tisa and its tributaries at the border profiles;[22]

2) make a list of the border profiles and the water quality parameters;[23]

3) monitor the quality of the waters according to the uniformed programs and methodology.[24]

The sessions of the States representatives in charge of the issues are to be held when necessary, but at least once in two years. The issues they do not resolve will be brought out before the representatives of the States.[25]

4.1.6. Other Agreements

There are also several more Agreements, dealing with water protection signed by the FPR of Yugoslavia, as follows:

1) Agreement between the FPR of Yugoslavia's Government and the Austrian Government on water management questions;[26]
2) Agreement between the FPR of Yugoslavia and Austria on water management issues relate to the Mura border sector and the waters of the river Mura;[27]
3) Agreement between the FPR of Yugoslavia and Hungary on fishery in state boundary waters;[28]

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19 It is not in force any more, and the draft of new one is under the preparation.

20 Yugoslav representatives in the Danube Commission did not accept the Recommendations.

21 Signed in Segedin, on May 1986, under the aegis of CMEA.

22 Art. 4. st. 3.

23 Art. 4. st. 4.

24 Art. 4.

25 Art. 9.

26 Signed in Geneva in 1954. The Interstate commission set up under this Agreement dealt with the protection against pollution of the river Drava.

27 Signed in Vienna in 1954. A permanent commission was in charge of dealing with water pollution issues.

28 Signed in Belgrade in 1957.

4) Agreement on water management issues between the FPR of Yugoslavia's Government and the Government of Bulgaria;[29]
5) Agreement between the Government of the FPR of Yugoslavia and the Government of Romania on fishery in state boundary waters.[30]

4.2. Present initiatives

At the moment, initiatives have been launched to adopt two conventions pertaining to the water protection of the Danube River.

4.2.1. Convention on Water Management Cooperation for the Protection of the Danube River[31]

According to this Draft Convention the Parties shall strive on achieving the goals of an environmentally sustainable, sound and equitable water management, including the conservation and the rational use of the Danube River and of the waters within its catchment area.

The Draft comprises articles which stated the scope and form of international cooperation, measures for the prevention, control and reduction of transboundary impact, the norms on emission limitation, water quality objectives and criteria, emission inventories, action programs and progress reviews, supplementary measures, monitoring programs, exchange of information and consultations, information to the public etc.

It is planned to set up an international commission for implementing the objectives and provisions of this Convention.

4.2.2. Danube Basin Ecological Convention[32]

The purposes that are to be attained through adoption and implementation of this Convention and related Agreements, include the wish of Parties that technologies created by mankind in the Danube basin will not endanger human health and safety, air, water, soil, climate, landscape, flora, fauna and living communities, including their biological diversity and possible role as bioindicators, as well as other environmental elements like subsurface water resources or their interactions.

Besides the articles regulating institutional agreements (Conference of the Parties, Sci. Council, Secretariat), monitoring of environment, environmental impact assessment, R & D etc., the Draft contains several worthwhile items. It is foreseen that, in order to achieve the purposes of the Convention, the Parties shall adopt related Agreements on

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29 Signed in Sofia in 1958.

30 Signed in Timisoara in 1961.

31 Draft of this Convention was prepared by Austria in 1991.

32 Draft of this Convention was made by the Temporary Secretariat of the National Authority for Nature Conservation of the Hungarian Ministry for the Environment and Regional Policy, 1991.

detailed control and regulation of (among others) agriculture, forestry, industries (like mining, processing of row materials, energetics, metallurgy chemical, glass, food processing, textile, leather, paper and pulp), infrastructure including water management) and transport. It is foreseen that the Parties adopt related Agreements on cooperation in basic research, environmental monitoring and environmental impact assessment, as well. Moreover, in an article it is stated that Parties shall—gradually, if necessary—introduce controls, limitations or bans on the technologies utilized by the activities referred above, which have an adverse impact or risk of an adverse impact, according to the specific environmental conditions of each subregion of the Danube basin.

This Draft Convention is very interesting as an effort to achieve a wide interconnection between the Danube basin states and to establish sectorial regional cooperation based on the principles defined in an ecological convention. This ambitious Convention we could call "umbrella convention".

4.3. An example on the "soft law" instrument

In the consideration of the methods for the establishment of international law on environmental protection, the fact should be borne in mind that the existing methods are, as pointed in theory, "slow, vague, expensive, uncoordinated and insufficiently defined". New methods are proposed for the establishment of international law, and preference is increasingly being given to "soft law".[33]

The effectiveness of such an approach is illustrated by the Declaration of the Danube basin countries on water management issues and especially on the protection of its waters against pollution.[34] The representatives of Danube basin countries have stated among other in the Declaration that preventing the pollution of the Danube waters and controlling the quality of these waters is an inseparable part of national policies in the environmental field. In view of the fact that the Danube waters are used for supplying drinking water, the Declaration expresses the commitment of the Governments of these countries to take measures to prevent the pollution of the Danube river, in the interest of present and future generations, in accordance with their existing national legislation, and within their technical-economic possibilities. In this context, special attention should be devoted to the prevention of pollution with hazardous and radioactive substances and to a gradual reduction of pollution levels, taking into account the ecological conditions of the Danube River.

Unlike international agreements, conventions or treaties,, this Declaration is not legally binding. This is a document expressing the good will of the Danubian countries Governments to undertake measures and activities designed to produce tangible results where the protection of the Danube waters against pollution is concerned. However,

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33 Sir PALMER, G. p. 259.

34 Adopted in Bucharest, on December 13th, 1985, after more than ten years of the preparation.

although it is of the "soft" law character, it was only after the signing of the Declaration that the continued monthly monitoring of the Danube water quality in border areas, applying similar analytical methods, was introduced for the first time ever (as of 1989).[35]

4.4. Activities of international and transnational organizations

A number of international organizations, such as UN ECE, as well transnational organizations, such as ILA, are intensively studying the international law aspects of water resources. The results of the often long-term activities of these organizations are a valuable basis for regulating international relations in the field of water protection. Certain organizations, like professional NGO's in the Rhine basin, have been developing the new cooperative relations.

4.4.1. Code of Conduit on Accidental Pollution of Transboundary Inland Waters[36]

This Code of Conduit is the first collective response by ECE member Governments to the need to reinforce international cooperation in preventing and combating accidental pollution, which have occurred in the ECE region resulting in adverse impacts on inland waters and aquatic ecosystems often extend beyond the country of origin. The emergency situations which developed have in many cases revealed a degree of unpreparedness at both national and international levels. Their occurrence has underscored gaps in existing legislation or lack of measures and procedures to cope efficiently with emergencies and their transboundary environmental impacts.[37]

The Code intended to guide Governments in the protection of transboundary inland waters against pollution resulting from hazardous activities in case of accident or natural disasters and in mitigating their impacts on the aquatic environment. It deals especially with transboundary effects of such pollution. It is aimed at the harmonization of national measures to be taken in this field and at the formulation of basic frames of international cooperation. Its objective is also to increase the state of preparedness to respond efficiently to such incidents.[38]

One of the basic functions of the Code is to serve as a reference point, particularly until such time as countries have entered into relevant bilateral or multilateral agreement.[39]

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35 HOCK, B.: Administrative Aspects of the Water Quality Management of the Hungarian Danube; Rhine-Danube Workshop, University of Technology Delft.—According to Ijjas, p. 6.

36 Adopted by the Economic Commission for Europe at its 45th session (1990) by decision c(45). The Code was prepared under the auspices of the Senior Adviser to ECE Governments on Environmental and Water Problems and funded under ECE/UNEP Project FP/5201-87-04.

37 CODE OF CONDUIT ..., p. iii.

38 P. 1.

39 Ibid.

4.4.2. The work of ILA

As it is well known ILA adopted The Helsinki Rules on the Uses of the Waters of International Rivers.[40] According to Helsinki Rules, a "basin State" is a state the territory of which includes a portion of an international drainage basin,[41] and the term "water pollution" refers to any detrimental change resulting from human conduct in the natural composition, content, or quality of waters of an international drainage basin.[42]

A basin State must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State, and should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin State.[43]

In elaboration of Helsinki Rules there were approved several articles on water pollution in an international drainage basin.[44] So, there were, among others, approved provisions according which States shall not discharge or permit the discharge of substances generally considered to be highly dangerous into the waters of an international drainage basin,[45] and shall enact all necessary laws and regulations and adopt efficient and adequate administrative measures and judicial procedures for the enforcement of these laws and regulations.[46] Basin States shall consult one another on actual or potential problems of water pollution in the drainage basin so as to rich, by methods of their own choice, a solution consistent with their rights and duties under international law.[47]

An article applies to the international administrative machinery for the entire basin, aimed to coordinate or pool scientific and technical research basin states programs to combat water pollution, to establish harmonized, coordinated, or unified networks for permanent observation and pollution control, and establish jointly water quality objectives and standards for the whole or part of the basin.[48]

4.4.3. International non-governmental organizations in the Rhine basin

International (non-governmental) organizations of water agencies (RIWA, ARW, AWBR and their umbrella association IAWR), have had a positive experience with activities aimed at remedying the widely reported pollution of the Rhine River, which was at its peak between 1950 and 1975. These organizations set up an extensive network of water

40 Approved at the 52nd Conference, held in Helsinki, 1966.

41 Art. III.

42 Art. IX.

43 Art. X.

44 Approved on the 60th Conference held in Madrid, 1982.

45 Art. 2.

46 Art. 3.

47 Art. 6.

48 Art. 7.

quality measuring at all relevant points, established close cooperation with national Governments, EEC, chemical industry, etc. In cooperation with other organizations engaged in water protection, these activities proved a great success, as the water quality of the Rhine River clearly shows.[49] This example is certainly a formula to emulate the protection of the Danube catchment area waters as well.

4.5. New tendencies concerning state sovereignty over natural resources

In legally regulating the protection of the Danube waters at the international level, the fact should be acknowledged that environmental protection problems transcend state borders, i.e. the confines of absolute sovereignty of states over natural resources. Awareness of this and the increasingly frequent need for harmonized and coordinated action by states in addressing global and regional problems, also require new approaches to certain traditional institutes of international law.

For instance, the theory of intergenerational equity, the cornerstone of which is a global ethos making it incumbent on present generations to treat all natural systems as the common heritage of mankind to be managed in a sustainable manner in the interest of present and future generations. This requires a change of the traditional perception of state sovereignty over natural resources and its relaxation to meet intergenerational equity requirements. Under this theory, every generation has the right to use natural resources within state sovereignty, but not to destroy, every generation has the right to use natural resources within state sovereignty, but not to destroy them and make them useless for the coming generations.[50]

This requirement to respect the rights of future generations entails the responsibility of states for the exercise of their sovereign rights over the natural resources they possess, responsibility for their own future generations is only one dimension of the overall responsibility involved. But, given the oneness of natural systems and their mutual (transboundary) interconnection, that responsibility features an international law dimension. Hence the traditional perception of state sovereignty set out in Harmon's well-known doctrine, is increasingly seen as a factor limiting and slowing down the development and application of the finest civilization concepts of sustainable development of nations. States are accordingly expected to waive their sovereignty to a certain extent to the competent supranational organizations in the interest of present and future generations with a view to the more efficient, sustainable, management of natural resources.[51]

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49 JUELICH, p. 3.

50 WEISS, p. 290.

51 Sir PALMER, G. proposed the creation a new specialized UN agency, or extending UNEP functions, p. 280. At the 1968 Buenos Aires ILA Conference, CAPONERA, D. pointed out that "an international administration was necessary in order to secure the integrated development of international drainage basins, deciding on priorities among various projects, settlement of disputes, implementation of investment and reimbursement policies, allocation of benefits deriving from international water resources development and

5. *Concluding Remarks*

The international law regime pertaining to water protection in the Danube basin should be looked into and carefully analyzed again, since several former countries in the basin do not exist anymore while new ones are now in existence. What more, there is also an urgent need for the joint and coordinated response of all the member states in the Danube basin regarding the water protection issues.

When regulating these issues between the states on the territory of former Yugoslavia and in the entire Danube basin as well it is important to bear in mind:

— that environmental pollution issues have been overgrowing the borders of only one state;

— the interest of future (as well as present) generations demands the ever greater responsibility of the state when managing its national resources and passing on its responsibilities to supranational entities which would ensure the better management of transboundary natural resources;

— the importance of international cooperation and the inter-regional linking of countries;

— that professional NGOs could achieve important results in the field of environmental protection through linkage at the regional or subregional level.

It is also important to make use of the results achieved by international and transnational organizations concerning the study of the relevant law and administrative aspects of international water resources. When choosing the methods for regulating these issues, it is a suitable way to use not only the traditional methods but also the advantages of the "soft law". And last, but not least important, all the interested states must be included into the process.

6. *Proposal for Future ILA Activities*

Bearing in mind what has been said so far, one can conclude that there are serious reasons for a comprehensive analysis concerning all the national codes and international bilateral and multilateral agreements relating to the water protection in the Danube basin. Such an analysis done by an ILA working group, for example, could be starting point in the development of a wide concept for regulating these issues in the Danube basin. Clearly, water protection problems should be seen as the part of a comprehensive Danube basin management policy.

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conservation activities, and for many other related aspects".—The work of the International Law Association on the Law of International Water Resources, p. 166.

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State Aid under the EC Hungary Association Agreement

Article 92/1/ uses a fairly clear-cut wording in order to send aid provided by member states to economic actors into the world of semi-illegality:

> *"Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."*

This provision is indispensable in a liberal approach, while still being necessary in a socialist or socially sensitive economic policy.[1] The reason for this is obvious. If after the removal of trade barriers economic actors can still take advantage from aid provided from state treasuries—still nationally compartmentalized—treasuries will compete with each other through subsidized economic actors, while annihilating viable but unsubsidized producers. In a Community terminology the state's self-imposed limitation to interfere with the economic processes is a precondition for a level playing-feld. Unluckily, however, all member states feel that their restraint in subsidizing their economies would

1 In 1990, the shadow Trade Secretary of the Labour Party was strongly criticized by the British Secretary of Trade, Nicolas Ridley, who claimed that the whole of the Labour Party's economic program amounted to an infringement of the EC rules on aid. However, it came to light only a couple of weeks after this accusation that the Conservative Government had spent huge sums in aid to facilitate the takeover of the Rover Group. See Alexander [1990], p. 21.

give an undue advantage to the producers of other member countries.[2] For this reason all invent tricky subsidy schemes through which they ensure themselves the political support of the subsidized industries as well as the support of the trade unions. It is result of this escalation that member states spend in an average a 100 billion ECU on subsidy schemes.[3] This is the figure known from and made public in state budgets. There not even estimates exist to indicate the amount off hidden subsidies. Moreover, taking into consideration the policies followed by the Commission, supporting various types of state provided subsidies because they fit into the system of "*compensatory justification*" and the immense funds it spends itself on aid projects, Article 92 appears in a rather different context. The liberal, non-interventionist image suggested by the Treaty of Rome is replaced by the American approach that regards the Commission's economic interventions as countervailable subsidies. At first sight though there is an interventionist practice and a non-interventionist legal picture. Our inquiry should look into how the Hungarian economy, with subsidy-thirsty liabilities like a declining industrial base, an ill-structured agriculture and a nascent service sector can fit into this picture. Our inquiry should first concentrate on the legal regime that joins—however loosely—Hungary to the Communities and that Hungary has to abide by.

The provisions of the Europe agreement relating to state aid

Article 62 or the association agreement concluded between the EC and Hungary,—entered into force in Article 32 of the Interim Agreement in March 1992 runs—provides for a comprehensive regulation in order to ensure undistorted trade between the Communities and Hungary.[4] First it determines the three problems most likely to affect bilateral trade and then it determines a special mechanism that helps evaluate these primarily competition issues. First it prohibits concerted practices [para (1) i] and dominant positions distorting competition [para (1) ii] and then it outlaws state aids that distort or threaten to distort competition [para (1) iii].[5] The language of Article 62 makes clear that the treaty constrains the actions of the Hungarian decision-makers and non-state actors to the extent their activities have an impact on bilateral trade. The *Phillip Morris* and the

2 In Firma Steinike & Weinlig the Court rejected the contention put forward by the claimant, the German government, that very similar aid projects were being carried out in other Member States, which served as a justification for similar aids granted by the German government. The famous decision reached by the Court was phrased as follows: 'The effects of more than one distortion of competition on trade between Member States do not cancel one another out but accumulate and its (their) damaging consequences to the common market are increased'. See Supra p. 612.

3 This estimate does not include aid provided to the agricultural and transport sector, or given by the Communities. This figure is put at 70 million ECU in A First Report on State Aids Survey, 1989, p. 70, and 100 million ECU in Kent, P., European Community law [London. Longman, 1992], p. 257.

4 It places outside the scope of state aid rules agricultural and fishery products and produce covered by Title III, and those products provided for in the ESCS Treaty and Protocol II to the Association Treaty.

5 This provision contains a verbatim repetition of the provisions of Articles 92 and 85, 86.

Re Tubemeuse decisions of the Luxembourg court shed a different light on this apparent limitation. These decisions make obvious that on the one hand neither export nor domestic subsidies are prohibited yet any fund provided in support of the economic activities may be qualified as affecting bilateral trade. Thus community law availed itself of no *de minimis* rule.[6] The provisions of the Treaty dealing with state aid are of a symmetrical structure. In principle they proscribe both aid by the member states of the Communities to community producers and by the Hungarian State to the Hungarian economic actors.[7] As however, Hungary was not an equal partner at the negotiating table but a backward country aspiring for membership this symmetry is more apparent then real.[8]

The Association Council is provided with a dual mandate by the association treaty. On the one hand it is to elaborate the implementing provisions of Article 62. On the other hand it is to serve as a primary forum of dispute settlement. In fulfilling this double function the Association Council and the parties have to take into consideration the following three phenomena:

– Community practice relating to Articles 92–94;[9]

– that Hungary at least for a period of five years is treated as a territory where the standard of living is abnormally low[10] or where there is a serious under-employment;[11]

– the reports provided at request or annually to the other contracting party in order to enhance the the transparency of aid projects or schemes.

The first point raises immediately exciting problems. The first of them is that the language and even more the interpretation given to Article 62 locates Hungary in a particular position in the external relations of the Communities. As a consequence of this provision, it is the domestic set of EC rules on dumping and state aid that is going to be applied in the bilateral EC-Hungary relations and not the the Communities external rules on the subject. These external dumping and subsidy rules incorporating the GATT rules apply only in the background and subsidiarily—as we shall see—and primarily with regard to dispute settlement.[12] A second question about this first point is whether on a true construction of this provision it instructs the Association Council to take into consideration both the practice of the Court and that of the Commission when it elaborates those implementing provisions. The answer is in the affirmative because

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6 See Supra.

7 The inclusion of the territory of Hungary within the categories of Article 92(3)(a) has rendered the relationship slightly asymmetrical in this area, too.

8 In fact, with respect to many of the provisions a strong asymmetry is noticeable.

9 (It) clearly states that any practice contrary to the provisions of the article is to be evaluated in the light of Article 92.

10 The average annual Hungarian GDP is estimated at $ US 3–5.000, which is trailing far behind the EC average, and even way behind the relevant figures of the poorest Member States. An excellent description of the discrepancies within the Communities is given by Wise and Gibb [1992].

11 In Hungary the unemployment rate was 12% at the time of writing. This figure reflects the number people entitled to unemployment benefit, which does not correspond to the number of those effectively out of work, though it takes no account of the illegally employed, either.

12 For more details, see infra at the discussion of the European Community regulation.

without taking into consideration the Reports and Communications of the Brussels Commission it is simply impossible to establish the content of the Treaty provisions. If that is so, however, it means that an aid provided by the Hungarian government to small and medium size enterprises may not simply be evaluated in the light of Article 62[32] of the Europe agreement but Court and Commission policies attached to its Roman original may as well have to be examined.[13] Yet, it is a difficult question—and this is exactly the third issues arising out of this first point—how these rules are going to be made in the Association Council. There is a complete set of Community legal norms and a pressing need for regulation in Hungary. Though the Communities may in lack of the common rules apply its external trade law and safeguard measures it is unlikely that this is going to be a preferred solution for the Communities. Therefore it will be in the interest of the Communities that the rules in the Association Council be set as soon as possible and be conform to Community law as much as possible.[14]

The second aspect might seem rather unambiguous at first sight, but after a closer scrutiny its contents still requires further clarification. The fact that the whole territory of Hungary is treated as a seriously backward area pursuant to Article 92(3) of the EEC Treaty, apparently seems to bring about a situation where aid given by the Hungarian state to economic sectors covered by the Treaty will not be regarded by the Commission as a violation of the Treaty for a period of five years, even if as a result of the aids provided, Hungarian export into the territory of the Communities might be increasing. We can seriously question whether this interpretation presuming a *five-year standstill period* can be substantiated. Instead a different kind of approach enlisting Hungary under the same heading as the Italian Mezzogiorno would seem more plausible, focussing on the one hand on what may be regarded as legitimate regional aid in such a seriously underdeveloped area hit by unemployment, and what forms of aid are prohibited even in such a backward territory if we take into consideration the principle of cylicism discussed below, and the general prohibition regarding the provision of operating aid. Consequently, the state aid rules of the Association Treaty do not entail a five-year grace period, only the prospect of a more sympathetic discretion accompanied by the immediate application of these rules seems more likely. This would undoubtedly create an awkward situation. In order to ensure untroubled trade and political relations between Hungary and the EC, Hungary would have to comply with the strict requirements of a legal regime vaguely defined in substance. At the same time, this cannot be achieved without experiencing real frustration, since by signing the treaty we have also adopted the *trial-and-error*[15] method which is applied in the course of the harmonization of the Hungarian rules of law

13 The question that immediately arises, is how the concept of practice is to be construed here, and whether letters of interpretive character, etc. sent to Member States by the Commission are included.

14 The travaux preparatiores not having been made public, the language of the Treaty does not state clearly, whether questions, if any, were raised about the possibility that through the establishment of rules of interpretation and enforcement, Hungary may be allowed a period of adjustment by the Association Council. This problem is further elaborated in the following passages.

15 I.e. 'the declaration of a legal injury followed by legal remedy'.

and EC practice. This situation, of course, is bound to generate constant confrontation between Hungary and the EC.

Two further *remarks* can be made here. *a)* It is very likely that the evaluation of the Hungarian state aid policy will be judged differently at different Commission levels. In all probability DGIV is set on eradicating systematically any instances of Hungarian practice which run counter to EC law. On the other hand, we can presume that only "*case-law*" violations of state aid rules will be caught on the Commission level, since the Commission itself is genuinely interested at least in the partial political success of the Treaty. *b)* The harmonization of EC law and Hungarian law is made all the more complicated by the fact that for the most part EC law cannot be regarded as law in the strict sense of the word, but a cyclically applied exercise in the management of the economy, which is manifested not so much in rules of law but in codes of behaviour and *policy papers*. In addition, no serious limititations can be imposed on the economic management practice pursued by the Commission seeking to find a delicate equilibrium between the Member States. That is the reason why in every respect the Commission is invested with almost full discretion, in the case of which subsequent reasoning seems more feasible than a prognosis beforehand and which corresponds only to some general requirements from the legal point of view.

In respect of the *third aspect* special emphasis must be put on the mutual trust the two parties had placed in each other when they announced that the Association Council would evaluate the reports on aid projects and schemes submitted annually or at request by the contracting parties. This partly arises from the fact that if the application of these rules should be enforced by Hungary itself and not only against Hungary as an offender, the Commission or the Hungarian Competition Office would only be invested with regulatory extra-territorial jurisdiction[16] and would not be entitled to conduct an investigation. In spite of this it does not follow from this regulation that the Commission and indirectly the Association Council would ignore information supplied by economic actors and that such information could not serve as sufficient grounds for proceedings initiated by them.

In critical situations when the implementing rules adopted by the Association Council are not sufficient to settle the problem in a satisfying manner or if such rules do not exist,[17] and the home industry of one of the parties is threatened by the other contracting party; the necessary unilateral protectionist measures might be taken in accordance with the GATT procedures after a 30-day cooling down period in the course of which the Association Council will serve as a forum for consultation.

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16 This was clearly demonstrated in the Woodpulp case, though a note should be taken of the fact that extra-territorial enforcement jurisdiction may be extended to those valuables of the extra-territorial offender, which are situated within the Community.

17 Such situations might occur prior to the expiry of the three-year period, or simply because those who formulated the rules of enforcement had not envisaged the occurrence of such circumstances. Should this be the ease, the Association Council might not borrow the relevant rules of the Communities in their entirety, since these rules form a complete system of rules in general.

Paragraph 6 of Article 62 of the Association Treaty has established a two-tier legal regime in respect of the areas covered by the Treaty between the two parties. Within the framework of this system the GATT rules play a decidedly subsidiary role in settling legal disputes in so much as they are only referred to in case the rules adopted by the Association Council do not offer a solution to the problem. As the Assocation Treaty has failed to provide a *tabula rasa* in Hungarian EC-relations, the GATT rules have remained in force in so much as they previously regulated bilateral relations, and in so far as the Association Treaty has not adopted new rules on these questions.

Particularly in the area of state aids, but also in respect of issues related to competition and provided for in the Treaty, peculiar problems might arise due to the different legal status accorded to the Association Treaty and to Articles 85, 86 and 92–93 within the context of Community law and Hungarian law. It is essential to point out here that in the EC member States certain provisions of the Association Treaty with Hungary are directly effective in so much as the requirements of EC law in respect of direct effect are fully met. In practice it means that in relation to certain provisions and in the case of the fulfilment of certain conditions the EC competitors of Hungarian companies may initiate legal proceedings before their own national courts by directly referring to the Association Treaty. These provisions and conditions of the EC Treaty referred to above incorporate Articles 85, 86 and the last sentence of Article 93(3) without any further condition. Article 92(1) also belongs here if it is enforced pursuant to Article 93(2) or Article 94.[18] The gradually unfolding practice[19] of the Court over the past 30 years has indicated that it tends to acknowledge within a member State the justiciability of certain provisions of the Association Treaty otherwise meeting the condition of direct effect, even if the law of the country in issue does not recognise the category of self-executing treaties. By contrast, Act 25 of 1982 still in force in Hungary is the major impediment to the justiceability of the Treaty provisions including the rules on competition and state aids and, to the possibility that these provisions may be referred to before a Hungarian court. A draft bill submitted by the Hungarian government in October 1993 and a proposed amendment to the Constitution might bring about some slight improvement in this respect. Yet, Hungarian producers still feel compelled to lobby the Hungarian authorities in order to protect their own interests or are seeking legal protection in the home countries of their competitors, as Hungarian courts are not entitled to offer them legal remedy.[20]

Another aspect of this problem would be the relatively efficient system of sanctions related to the set of rules on state aid, which however is not the subject of our present study. Almost without any exception the Court has ordered several big undertakings to

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18 Neither Article 92 nor 93 are directly effective.

19 21–24/72 International Fruit Company [1972] E.C.R. 1219, p. 1239; 181/73 Haegemann [1974] E.C.R. 449, pp. 459–460; 104/81 Kupferberg [1982] E.C.R. 3641, pp. 3662–3663; 12/86 Demirel [1987] E.C.R. 3719, 3752-4; The latter raised similar questions in respect of the Association Treaty between Turkey and the EC.

20 For further information regarding this subject and Article 37 of the Treaty of Rome see COWNIE, Fiona: State aids in the eighties in E.L.R. 1986, pp. 247–267.

repay huge sums which had been granted to them in a breach of the rules on state aid.[21] In the light of the Court's opinion on extra-territorial jurisdiction concerning competition law[22] it can be easily imagined that in respect of the Association Treaty certain issues related to Hungary will be brought before the Luxembourg Court. In the next section a brief discussion of the subsidy rules of the ATT is followed by a closer examination of how these rules are to be applied/interpreted in EC-Hungarian relations.

The GATT Rules

The *GATT* rules make a clear distinction between *export* and *non-export* subsidies, and within the category of export subsidies different rules apply to raw materials and finished products.

Article XVI of the GATT stipulates that Member States are under obligation to give notice of export subsidies and subsidies which are likely to result in the decline of imports. It concedes that granting subsidies could be detrimental/damaging to the market interests of other states, and whereas in regard to raw materials it makes the pursuit of the avoidance of subsidies compulsory for the contracting parties, in the ease of other products it prohibits any export subsidies bringing about such a situation where the export price of the product concerned is lower than the prices applied to similar products on the domestic market.

In the *Subsidy Code of the GATT*, in which Hungary is not a participant,[23] the signatories made a commitment to the effect that they do not impair/cause damage to the domestic industries of the other contracting parties through granting subsidies, do not severely harm their interests in that respect and do not annul those advantages/benefits to which the other parties are entitled to on the basis of the GATT. True to this spirit the signatories renounced their right to subsidization[24] and obliged themselves to take pains in order to avoid causing damage to other Member States by granting non-export subsidies.[25]

In case of a breach of rules/an infringement of rules two different procedures can be followed on the basis of the GATT. Procedure *Track 1*, which is based on Article VI (3) and (6) of the GATT, is also applicable to production, assembly and export subsidies and provides for the imposition of countervailing levies in compensation for subsidies which have already been granted. This option, of course, necessitates the exact estimation of the damage which has been or is likely to be incurred in consequence of the subsidy

21 Wyatt (1993) pp. 540–541.

22 Butterworths (1993) p. 2.

23 As the Subsidy Code forms a part of the EC law, which has been by and large directly integrated into the Association Treaty of Hungary through the Association Council, a very intriguing indirect 'transference of obligations' might occur.

24 Article 8, para. 3.

25 Articles 9(1), 10 and 11.

provided[26]. Procedure *Track 2* is applicable to subsidies granted in violation of the Code to aids which are harmful to the economies of other countries or invalidate the benefits/advantages attained through the GATT. Should this be the case, countermeasures may be implemented with the consent of the parties concerned and even the withdrawal of the GATT treatment may be effected.[27] The GATT, the GATT Rounds and the Subsidy Code had failed to provide a *proper conceptual definition* of the term 'subsidy'. Article V of the GATT introduced the term without defining it and at a later stage neither the travaux préparatoires nor the 1961 Report submitted by GATT experts, or the Kennedy Round made any significant progress towards conceptual clarification. A special committee of experts have been entrusted with making further investigations into the subject, but they have seemed unable to come up with any results worthy of mention to date.

Beseler argues that a subsidy falling within the scope of the GATT constitutes a) some form of governmental intervention, b) which is financed from public funds c) and offers some kind of advantage to those subsidized. In addition, another important element of the notion of non-export subsidy is that d) it is specific to certain sectors and, finally, e) causes damage. The American approach differs from Beseler's description in that it regards as countervailable subsidies not only state aids, but subsidies provided from private funds.[28] Interestingly enough, it was the Americans who incorporated the *test of sector-specificity* into the definition.[29]

It should be stressed here that the GATT rules are softer/weaker than the relevant EC rules, partly because of the gaps in them leaving huge areas uncovered, and partly as a result of the difference in treatment accorded to domestic and export subsidies, whereby they are bound to wind up in the dead-alley of input-subsidization.

The non-export[30] subsidy rules of the GATT deviate from the relevant EC rules not only in so far as—according to the Committee's judgement—the distortion of competition and the resulting damage is a precondition for the illegitimacy of domestic subsidy,[31] but also in that further differences can be detected in the handling of certain partial and sectoral issues.

In 1982, for example, the United States and the EC were deeply embroiled in a bitter debate over bank credits extended to loss-producing steel companies. The Americans argued that these undertakings could have obtained credit only through state intervention, whereas the EC pointed out that the GATT does not make a distinction between recipients of credit on the basis of financial standing/creditworthiness. What really matters

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26 In this case the imposition of countervailing duties must be preceded by a preliminary review. Countervailing duties of temporary nature may be imposed even while the examination is still underway.

27 In the course of a Track 2 procedure it is not necessary to prove the damage suffered by the home industry, but this procedure may only be applied after extensive consultations.

28 19 USC 1202 et seq.

29 Beseler (1986) p. 139.

30 The GATT export subsidy rules are dealt with in the section on the external export subsidy rules of the EC.

31 EEC Memoranda [July 9, 1982, and October 5, 1982] GATT Doc. No. SCM/35 [October 10, 1982].

in this case is whether interest terms correspond to real market conditions.[32] As is evident from this, the EC did not apply the market investor principle.[33]

In connection with public procurement the Americans likewise emphasized the principle of the market investor driven by the profit motive, while the EC argued that in certain situations share prices exceeding their real market value are justifiable on account of "*the inherent value*" of shares.[34]

In the light of Article V of the GATT the subsidization of research and development qualifies as a countervailable subsidy in so far as it constitutes part of the production or manufacturing process. In American practice research and development is regarded as part of the production process, provided the final results of the research activity remain unpublished and become the exclusive possession of certain producers.[35] This view is also endorsed by the European Community.

The 1982 steel debate between the United States and the European Community, which focussed on regional aid, made no progress whatsoever in bringing closer the diametrically opposed views of the two parties on the subject. The EC negotiators insisted that regional aid is designed to cover the expenses run up by economic actors as a result of their transfer into an underdeveloped area, so by no means does the provision of such aid constitute a case of *ensuring undue advantages*. The Americans advocated the view that regional aids per *definitionem* are designed to divert trade and virtually manage to elicit such an effect, so they are to be regarded as measures affecting normal market conditions.[36]

It will be obvious both from what has been said above and the section to follow that the GATT rules which are to be applied only subsidiarily though, in respect of Hungarian–EC relations, are built upon an entirely different conceptual system and consist of rules different from and even less lucid than the Community rules.

The European Community regulation

The European Community has created its own legal regime over the past 35 years. The functioning of this regime stands apart from the rules of international economic law, and it emphatically accords a different treatment to legal matters/facts which fall within and to those which fall outside its territory. It has adopted its own rules for governing state aids, which are enforced only within the Community, that is, these rules are applied when producers within the Customs Union are given undue advantages by their states through circumventing or violating the rules of play. The EC rules cover export and domestic

32 EC Memorandum GATT Doc. No. SCM/35 [October 21, 1982].

33 See the passages below dealing with the problem of definition.

34 See Note 32, supra.

35 Fresh Cut Roses from Israel, 45 Fed. Reg. 58516 (1980); Liquid Optic Level Sensing Systems from Canada 44 Fed. Reg. 58616 (1980); see also Note 32, supra.

36 Certain Steel Products from Belgium 47 Fed. Reg. 39304.

subsidies alike, however, there exists another level of rales which provide for relations between the Customs Union and third countries. These relations are governed by the GATT rules,[37] the so-called Subsidy Code[38] and the Council's Regulations on dumping and subsidies. As pointed out above,[39] countries having joined the Europe Agreement have found themselves in a peculiar position, since it is the special rules adopted in the Association Council pursuant the EC regime and not the GATT rules which are to be applied in their relations to the Community. Thus, Eastern Europe has moved into the inner circle in the external relations of the European Communities, where only the members of the European Economic Area established by the EC and the EFTA states, occupy a more favorable position, the innermost section within the circle.

Rules for State Aids and Subsidies in the External Relations of the European Communities

It would require a study of considerable length to take under close scrutiny the rules for state aids and subsidies in the Communities' association practice therefore the focus of this section centres around four of the association treaties: the Mediterranean treaties, that is, the treaties with Turkey, Malta and Cyprus, and the Polish Treaty, which falls within the same category as the association treaty signed between Hungary and the EC.

In Article 16 of *the Association Treaty with Turkey*[40] the contracting parties agree that the competition rules of the Treaty of Rome "must be made applicable in the bilateral relations of the two parties"; while Articles 12–14 state that in regard to the freedom of movement, establishment and services, the relevant provisions of the Treaty of Rome will serve as guidelines for achieving these objectives in bilateral relations. Article 15 has made the extension of the rest of the (EC Treaty) provisions not included in the Association Treaty conditional upon the improvement of the Turkish economy. Strangely enough, the Association Treaty with Turkey does not comprise any (other) rules which could be linked to dumping or state aids.

Using identical phrasing *The Association Treaty with Malta*[41] *and The Association Treaty with Cyprus*[42] both refer disputes over dumping and subsidies to the Association Council for further consultation and allow the application of Article V of the GATT. The agreements make no attempts whatsoever at approximating the legal systems of Cyprus and Malta to EC law either in this or any other respect, which means that in spite of having signed the association treaties, both Malta and Cyprus will continue to be "third countries" in essence.

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37 Basic Instruments and Selected Documents, vol. IV. Geneva 1969.

38 Basic Instruments and Selected Documents, 26th Supplement, Geneva 1980. pp. 56 et seq.

39 See on page 4.

40 J.O. 3687/64 [December 29, 1964].

41 J.O. L 61/1 [March 14, 1971] Article 8.

42 O.J. L 133/2 [May 21, 1973] Article 8.

The *Interim Agreement* partially implementing the *Association Treaty with Poland*[43] uses practically the same wording in relation to state aids, as the Association Treaty concluded between Hungary and the EC.

As is evident from the treaties discussed above, the Communities have already concluded one agreement, namely the one with *Turkey*, not on state aids, though, but in other fields, which, after making references to/evoking the relevant articles of the Treaty of Rome, leaves it to the future or rather to the Association Council to elaborate further details related to the subject. In contrast with the two agreements signed in the 70's, the treaty concluded between Poland and the EC, as well as the rest of the treaties signed with other countries, delegate the associate members to a special inner circle, through which they have been brought in some respect closer to the Communities than the Mediterranean countries excepting Turkey. A thorough analysis of the Turkish association treaty could provide interesting examples of legal harmonization, which might be useful from the point of view of Hungary's association.

The structure and functioning of the EC regulation

The EC rules for state aids operate on several levels, but from the point of view of security in law, or rather rule of low, this regulation is far from being satisfactory. *Articles 92–94 of the Treaty of Rome* provide only a wider framework. The normative limitation contained in Article 92(1) is followed by the enumeration of exceptions in paragraphs (2) and (3). Article 93 mostly deals with procedural rules for the notification of aid schemes and judicial review. This article establishes a special legal basis for judicial proceedings, and also delegates individual and normative powers of decision to the Council and to the Commission. *Article 94* which invests the Council with special legislative powers has never been put in practice, which partly explains the relative insignificance of *legislation through regulations and directives*. The Commission is allowed to exercise a relatively wide margin of discretion, which is kept within bounds by the the Commission itself in such a way that in the communications and policy papers issued, it gives advance warning of what kind of decision might be expected and what policy it is likely to be pursue in certain situations. It is to be noted however, that these policies are not justiciable. A major limitation on the Commission exercising its discretion is imposed by the *right to initiate legal proceedings* pursuant to Articles 93(2), *173 and 175*, since the criteria (discretionary limitations) laid down in *Article 92* may also be subject to discretionary interpretation.[44] Under the above-mentioned articles the Court may conduct a judicial revision of the Commission's decisions, primarily from the

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43 O.J. L114/8 [April 30, 1992] Article 33.

44 MORTELMANS, K.: *The compensatory justification criterion in the practice of the Commission in decisions on state aid* in: 21 C.M.L. Rev. p. 405, 1984; ROSS, M.: *Challenging State Aids: the effect of recent developments* in: 23 C.M.L. Rev. p. 867, 1986; SLOT, P. Y.: *Procedural aspects of state aids: the guardian of competition v. the subsidy villains* in: 27 C.M.L. Rev. 1990 pp. 741–760; SLOT, P. J.: *Procedural and substantive compliance required* in: 16 E.L.R. pp. 38–47, 1991.

aspect of procedure and to some extent from the point of view of substance. One of the procedural limitations on the Commission is that it may not infringe the procedural rules by which it is also bound, and it is required to ensure fair hearing and give a reasoned opinion of its decisions. There are certain limitations, not too many though, which influence the substance of decisions. Although the Court, which considers the Commission having all information relevant to the case, the most competent and suitable organization for making decisions, and which does not impede the Commission in taking its discretionary decisions, still requires the Commission to provide a reasonable explanation for its decision when the case is brought before it. In the *Intermills* case for instance, the Commission was required to prove before the Court in relation to an emergency aid granted that the winding up of the undertaking in question was more favourable in terms of competition than its restructuring.[45] In the same case the Court held that when evaluating the aid the Commission had ignored its potentially favourable effects on competition terms, so it judged the reasoning of the Commission to be insufficient.[46] In the *Belgian textile case*, in contrast, the Court approved of the principle on grounds of which the Commission accorded a different treatment to areas specified in Articles 92(3)(a) and 92(3)(c).[47]

The definition of state aid

Instead of giving a clear definition of state aid, Article 92(1) of the Rome Treaty[48] simply circumscribes it by stating that state aid must be granted by the state, is incompatible with the common market and must affect trade between member states.[49]

The Court of Justice held that Article 92(1): *'refers to the decisions of Member States by which the latter, in pursuit of their own economic and social objectives, give by unilateral and autonomous decisions, undertakings or other persons' resources or procure for them advantages intended to encourage the attainment of the economic and social objectives sought.*[50]

Although the definition of the Court and the article make it clear that 'state aid' constitutes a particular situation in which effective advantages are granted to undertakings or private parties, the replies given by the Commission to the Written Questions submitted in the Parliament,[51] the confidential Commission documents, the Survey

45 See the section on survival aid below.

46 [1984] E.C.R. p. 3832.

47 248/85 Germany v. Commission [1987] E.C.R. p. 4013.

48 See the text on p. 3.

49 In 173/73 Italy v. Commission, the Court made it clear that it is immaterial what reasons led to the granting of aid. [1974] E.C.R. p. 709.49

50 61/79 Amministrazione delle finanze dello stato v. Denkavit [1980] E.C.R. p. 1205.

51 J.O. 1963, 2235; quoted by Quigley [1988] 13 ELR p 242. The reply to a Written Question gives a list of numerous forms of aid including direct subsidies, exemption from duties and taxes, exemption from parafiscal charges, loan guarantees on especially favorable terms, making land and buildings available

Reports and Policy Papers of the Commission have jointly managed to clarify the concept of state aid by providing lengthy enumerations.[52]

Precluding the possibility of a taxative approach, for those who favour a normative definition against an enumerative description, several attempts have been made at clearing up the exact status of state aid.[53] These definitions have highlighted three important elements of state subsidies:

a. state aids ensure undue advantages to the recipient;

b. they are granted from public funds;

c. they are provided in a selective manner or to certain sectors (sector specificity).

ad a) 'Advantage' as a conceptual element cannot be subject to dispute,[54] but ambiguity arises when the advantage appears in the from of granting short-term credit, manipulating interest rates or in some kind of investment.[55]

ad b) Furthermore, the advantage given to certain undertakings or sectors must result in a debit to the state budget. If it is not so, there can be no question of granting a state aid, which is true, for example, in case of floor prices, where it is the consumers who are affected by the measure.[56]

Aid not granted through state resources was the focus of the *Steinike & Weinlig*[57] and *Buy Irish*[58] cases. In *Steinike & Weinlig* state revenues from duties were transferred to a statutory but non-state organization, which in order to promote German agricultural interests, spent the funds on market research and advertising. In *Buy Irish* the subject of dispute was centred around a promotion campaign in Ireland which aimed at persuading Irish customers to purchase Irish goods instead of foreign products. The promotion campaign was supported by a private company, which, however, had received very generous financial support from the state on several occasions. Aid has been granted through regional or local governments in a number of cases.[59] In *Commission v. France (Caisse nationale de credit agricole)* the Court ruled that the favourable credit terms extended to agricultural producers had not been based on the independent decision of the financial institution which had granted the credit, therefore the payment qualified as a

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gratuitously or on especialy favorable terms, provision of goods and services on preferential terms and indemnities against operating losses. Wyatt also quotes a subsequent document on this subject issued by the Commission. [Doc. 20.502/IV/68 of December 1968].

52 The Commission conducted three consecutive surveys in 1989, 1990 and 1992 of State aid and published a catalogue of policy guidelines. [Competition Law on the European Communities, Vol. II: Rules applicable to state aids.]

53 Quigley (1988); Dony-Bartholme (1993).

54 6 & 11/68 France v. Commission [1969] REC p. 526; 173/73 Italy v. Commission [1974] REC p. 709.

55 See infra.

56 [1982] E.C.R. p. 25.

57 78/76 Firma Steinike und Weinlig v. Germany [1977] E.C.R. 595.

58 249/81 [1982] E.C.R. 4005.

59 For more details on the expansion of the content of state within the contect of direct effect see Prechal, S.: Remedies after Marshall in 27 C.M.L.R. pp. 451–473. (1990).

state aid.[60] In *Alfa Romeo*, on reviewing the support given to the car manufacturer by the IRI holding company, the Court found the IRI was not an independent undertaking, but an economic entity operating under strict state control, therefore the absence of the ability to make autonomous decisions was beyond any doubt.[61]

Though the Court had failed to lay down precisely what other instances qualify as an *act of state*, it pointed out that, *'In applying Article 92 regard must primarily be had to the effects of the aid on the undertakings or producers favoured and not the status of the institutions entrusted with the distribution and administration of the aid'*. Relying on this conclusion, the Court stated that the grantor of aid is of little consequence, if the origin of the payment can be traced back to public funds.[62]

The decision in *Buy Irish* considerably contributed, not to the convergence though, but to the approximation of the practices of the two key GATT negotiators, that is, the European Community and the United States in establishing the range of agents or organizations whose support is to be regarded as state aid. The American practice is different in that it classifies subsidies provided by private persons, even if such payments lack the character of state aids, under the rubric of countervailable subsidies.

ad c) The definition in Article 92(1) prohibits only those aids which favour certain undertakings or economic sectors. It would follow from this that general policy measures and aids aiming for economic recovery and rehabilitation may be permitted. Unfortunately, it immediately raises the problem of where the line should be drawn between specific and general measures. This is one of the issues to be discussed under the title to follow.

The problematic nature of defining state aid

The inclusion in the category of state aids of such forms of payment as direct transfers, special financial constructions ensuring tax benefits, preferential loans, and credit guarantees posed no serious problems for the Commission and the Court. Yet, there remained several definition problems which required further clarification.[63] Neither the Commission nor the Court has been able to

(*a*) draw a clear line between state aids general economic policy measures,

(*b*) determine the exact nature of money infusion given to undertakings struggling with difficulties through state "purchases",

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60 290/85 [1985] E.C.R. p. 439.

61 C-305/84 Italy. Commission [1991] E.C.R. I-1603.

62 The so-called Transparency Directive may be of use to the parties concerned seeking to find out in the cobwebs of red tape if an aid can be traced back to such sources. Dir. 80/723, O.J. 1980 L195/35 as amended by O.J. 1985 L229.

63 In the Italian textile case it became obvious that an aid granted in compensation tor higher social contributions may not be justified, since 'in the application of Article 92(1) the point of departure must necessarily be the competitive position existing within the common market before the adoption of the measure in issue'. 173/73 Italy v. Commission [1974] E.C.R. 709.

(*c*) give a satisfactory answer to the question raised by the de minimus rule,

(*d*) find an acceptable legal solution to the problem related to the treatment of preferential pricing and the provision of services,

(*e*) provide an unchallengeable answer to the problem of support granted to state undertakings,

(*f*) offer reliable guidelines for the dilemma of cyclical application.

ad a) The Freedom of the conjunctural policy of the state

It is clear that Article 92 does not prohibit economic intervention by the state in general, neither does it disallow devaluation and comprehensive economic measures aiming at improving/enhancing the competitiveness of domestic industry. It is the economic union to be established pursuant to the Maastricht Treaty that will impose restrictions on such measures. In numerous cases, however, it still remains unclear what constitutes a general, that is, permitted and what should be looked upon as a specific, that is, prohibited measure. The American practice has introduced the test of sector-specificity according to which "aid" constitutes support "*accorded to an individual company, a sector of industry, a discrete group of companies, or a special group of industries by the state or under the inspiration of the state*".[64] The GATT rules appear to be reflecting the same principle,[65] which immediately raises the question why in *Commission v. France (6 & 11/69)* the Court held that a preferential export bank discount applying to all exported domestic products constituted an aid.[66] This reasoning played an even more significant role in Deufil where the plaintiff insisted that a support of 3 million DM granted to an undertaking was to be regarded as such a measure which the state is entitled to introduce under Article 103 providing for conjunctural policy measures. This argument was rejected by the Court on the grounds that individual undertakings had benefited from the measure.[67] By contrast, in *Fediol* the Court came to the conclusion that a special financial scheme involving 27 agricultural products was to be regarded as a general measure aiming for the stimulation of the economy as a whole. In this case the judgement did not seem to have applied the test of sector specificity in regard to agriculture.[68]

In another case the Commission stated that an across-the-board social security package to be implemented by the Italian government step by step, but only in the area of industrial production at the first stage, should be considered a measure of general

64 Section 1312 of the Omnibus Trade and Competitiveness Act of 1988 Pub. L. No. 100-418, 102 Stat. 1107 (1988).

65 Adamantoupulos pp. 438–440.

66 According to the decision of the Court the credit given on more preferential terms had given undue advantages to national manufacturers exporting their products.

67 The so-called Task Force set up to review the aid policies applied in the Member States, also dealt with this issue. XVIIth Rep. on Competition Policy.

68 187/85 FEDIOL v. Commission [1988] E.C.R. 4155.

character. The dilemma here was whether this measure would be divested of its general character by the fact that the initial stage of the social security scheme involved only a special branch of the economy.[69] Similarly, the Commission held that a special measure issued by the Dutch government and granting tax reduction/concession to buyers of environmental-friendly motor-cars, constituted a general measure. The appraisal of the Committee pointed out that the fact that tax relief was equally applicable regardless of the origin of the products, and each car manufacturer seemed technically capable of the installation of such equipment, served as a solid basis for the reasoning of the Commission that the measure in issue was of general character.[70]

The issue of *social dumping* has always been the subject of heated debates within the Community, nevertheless this issue has never been and will probably never be brought before the Court of Justice. Here we are dealing with a special kind of aid given by the United Kingdom to its own economic actors and foreign, mainly Japanese producers established within the territory of the United Kingdom. Since during the years of the Thatcher era the British *'rolled back'* or *'impeded'* social legislation,[71] the British Isles have turned into an investment paradise for investors hungry for lower rates and taxes. This resulted in the migration of numerous big French and German investors transferring their production capacity to Albion, which sparked off noisy protests from Jacques Delors among others. It should be noted here that this type of support is not prohibited.

In summary, it can be ascertained that the Community law has failed to create a clear definition by which a clear division line could be drawn between specific and general measures.

ad b) Money infusion and state purchases

The decisions of the Court in *Intermills*,[72] *Leeuwarder*[73] and later in *Re Boch*[74] declared state aids granted in the form of capital infusion illegal, provided an investor driven by the profit motive had refused to buy shares in the undertaking in question due to the low dividends or profit he could earn from the purchase.[75] This approach/interpretation was later reinforced by the decisions taken in *Italy v. Commission* (C-303/88 [1991]) and *Italy v. Commission* (C-305/89[1991]),[76] and a similar approach was

69 First Survey, Point 14.

70 XXth Report on Competition, Point 199.

71 The United Kingdom opted out of the Social Chapter (Protocol?) of the Maastricht Treaty.

72 Intermills v. Commission [1984] E.C.R. 3809.

73 296 & 381/82 Leeuwarder Papierenwarenfabriek v. Commission [1986] 3 C.M.L.R. 380.

74 Belgium v. Commission [1986] E.C.R. 2321. *"In the case of an undertaking whose capital is almost entirely held by the public authorities, the test is, in particular whether in similar circumstances a private shareholder having regard to the foreseeability of obtaining a return and leaving aside all social, regional policy and sectoral considerations, would have subscribed the capital in question."*

75 For more details see Hellingmann (1986) pp. 111–133.

76 C-303/88 [1991] E.C.R. I-433; & C-305/89 [1991] E.C.R. I-1603.

adopted in *the Communication of the Commission to the Member States in respect of the application of Articles 92 and 93.*[77] In the above cases it is rather the Italian reasoning rejected by the Court than the decision itself that deserves particular attention. The Italians were trying to persuade the Court that within the undertaking in question large privately owned holding companies were also carrying out money transfers which were not expected to yield profits either in the short or medium term.[78] The Court discarded this argument by maintaining that a reasonable return for the money invested was required at least in the long term, otherwise the capital injection granted free was nothing but a camouflage of aid.[79] With regard to Hungary[80] the second case[81] related to the privatization of the Rover Group might command considerable interest. In the course of the privatization of the Rover Group the British government wrote off some of Rover's outstanding debts in an attempt to improve the financial standing of the company. On examining the case the Commission stated that there was absolutely no reason why in the course of the takeover of the seriously debt-ridden Rover Group by British Aerospace, the Group should be sold as free from encumbrances, and why a further 800 million pounds should be given to British Aerospace for the purpose of debt management. This was all the more unjustifiable if the generally high indebtedness of the companies in the motor car industry was taken into consideration. A similar problem was encountered in *Volvo Car Corporation*, where the loss-making Dutch plant of Volvo was sold to Mitsubishi in such a way that the total cost of closing down was passed to the debit of the Dutch state, a shareholder in the company. Afterwards the Dutch state sold its shares

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77 O.J. 1991 C 273/2; The Preamble to the Transparency Directive confirms this principle by stating: "Whereas such transparency in respect of public undertakings must make it possible that a clear distinction be made between the role of the state as a public authority and its role as a shareholder. In June 1989 the Commission approved of a capital infusion by the Dutch government into Fokker, a Dutch company whose shares had been purchased by the state at the then market price. When the British government purchased shares in the Rover Group with the purpose of enabling the company to write off its debts towards the state, the Commission persuaded the British government to decrease the amount it had intended to write off from 800 million to 469 million pounds. See also Ross (1989) p. 172.

78 BERLIN, D.: *L'adoption du régime des enterprises publiques aux normes internationales et communautaires* in: RTDE p. 232, 1983, vividly exemplifies that even investors keeping in view the market investor principle, might decide on further capital investments upon finding that the winding up of the company might prove to be more costly than its maintenance. For another excellent example of the reasoning of the Communities at the GATT talks on this issue see supra, Note 34.

79 See Adamantoupulos pp. 447–448 for more details on the external aspects of the problem.

80 The Hungarian practice can boast of several cases involving writing off or forgiving debts, or the conversion of debts into equity participation, which would undoubtedly arouse the interest of the Commission. In Hungary it is the rules on annual settlement accounts that reveal to some extent such interventions by the state. In Enclosure No. 8 to Act LXII of 1992, the Hungarian Parliament approved of the conversion of state aid to equity participation in the case of 22 public undertakings. Out of a total of 3000 million Hungarian Forints specially allocated for this purpose, Ganz Danubius was granted 1153 million, while Suzuki's share amounted to 700 million. Only a thorough examination could bring to light/unmask whether these instances of state intervention in the summer of 1991 had been carried out in the spirit of the market investor principle.

81 89/58 EEC, July 13, 1988 in: 1992 1 C.M.L.R. pp. 876–892.

to Mitsubishi at a bargain price, and even extended a long-term interest free credit worth 7 million Dutch gulden to the Japanese. Under Article 93(2) the Committee initiated proceedings on account of the transaction.[82]

ad c) The problem of the de minimis rule

In its decisions in *Deufil*,[83] *Philip Morris*[84] and later *Re Tubemeuse*[85] the Court made it clear that it was unwilling to overlook the granting of smaller subsidies and the support given to undertakings carrying less weight marketwise by employing some kind of de minimis rule. This meant that the Court had gone to such lengths that it virtally ignored the clause: *'in so far as it affects trade between member States'* in Article 92(1), and it just stopped short of saying that any aid was automatically illegal or automatically affected trade between Member States.[86] That the Court was not willing to apply de minimis rule by adopting the analogy of Article 85, was due to the fact that in the Court's opinion the contribution of the state to the distortion of market conditions was more threatening than that of the non-state actors on the market.[87] In light of this it would seem surprising that in a letter addressed to the Member States, the Commission emphasized that it did not raise any objection to the notification of new aids[88] with an intensity of less than 7.5% provided the recipient employed less than 100 workers and the turnover of the undertaking did not exceed 10 million ECU.[89]

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82 O.J. C105 [April 25, 1992].

83 In 310/85 Deufil v. Commission [1988] 1 C.M.L.R. 553 Advocate General held the view that *"Under such circumstances, aid in the form of investment/equity participation decreasing the production costs of a producer, is bound to have an impact on the competitive position of all the other producers both within and outside the common market, and therefore also on trade within the Communities."* Having been granted an aid of 3 million DM, 3 Deufil succeeded in doubling its market share on a saturated market within a year.

84 In Philip Morris Holland v. Commission 730/79 [1980] E.C.R. 2671, pp. 2688–89 the Court noted that. *"When financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade the latter must be regarded as affected by that aid."* In this case aid had been given to a huge company, which created only an significant number of jobs, while at the same time its production for export increased considerably.

85 In C-142/87 Belgium v. Commission [1990] 1 E.C.R. 959 the Court rejected the contention put forward by the Belgian government that the 5 per cent principle should be applied in relation to state aids.

86 Wyatt (1933) supra p. 527.

87 Ross (1989) p. 170.

88 SG (85) D/2611 of February 28, 1985.

89 The letter ruled out the granting of such aid falling within the category of operating aid, export subsidies and special political considerations (guidelines). Ross (1989) pp. 171–172 refers to Case 258/85 France v. Commission, where the intensity of the disputed aid granted to the textile sector did not exceed 5.5%, yet it was regarded as an infringement of the provisions of the Treaty of Rome. For more details on the Commission's policy on aid to small and medium-sized undertakings see Community guidelines on state aid for small and medium-sized enterprises [O.J. C213, August 19, 1992]; Communication to the member States on the accelerated clearance of aid schemes for SMEs and of amendments of existing schemes [O.J. C213, July 19, 1992).

ad d) Preferential schemes (systems) and services

In spite of the fact that preferential price systems are relatively easy to "catch", they pose serious procedural problems both for the Commission and the Court. In *Cofaz*, for instance, the French complainants (competitors) first took their case involving a preferential price system specially applied in Holland in favour of Dutch producers of chemical fertilizers before the Commission. Being unsatisfied with the decision reached by the Commission upon closing the file, the complainants were practically bogged down in lengthy and tedious procedural battles in order to prove their locus standi to challenge the Commission decision before the Court. Only after their point had been proven, was it possible for the Court to examine the restructured but still two-tier Dutch gas-price system, which led the Court to the conclusion that the support given to Dutch producers through the price system was such that it created in an impossible situation for French producers not only abroad but also on the domestic market.[90] In addition to the problems caused by the role of the state in making energy,[91] land[92] or buildings[93] available to economic actors at favourable prices, instances of economic intervention by central state holding companies and other economic authorities have also captured the Commission's attention. The privatization process which was launched by Treuhandanstalt at the Eisanach Trabant plant and which involved a significant improvement in the infrastructure of the plant including the building of an industrial railway, a sewage system and the general rehabilitation of the whole area in order to make it more attractive for its potential buyer, the Opel Works, constituted illegal aid according to the appraisal of the Commission.[94]

The official response to a Written Question[95] submitted in the European Parliament and general state practice in this field both indicate that the rules for state aids do not provide adequately for public projects carried out by states with the aim of luring investors to certain regions or cutting down the start-up costs of investments.[96] In its reply the Commission formulated the policy guidelines in relation to this issue by pointing out that the traditional financing of the improvement of infrastructure from state or local government budgets cannot be regarded as aid under Article 92, as opposed to those "projects which are purposely carried out in the interest of one or several undertakings or certain types of products", and which are therefore caught by Article 92.

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90 Cofaz (Compagnie francaise de l'azote) SA and others v. Commission; 169/84 [1986] E.C.R. 409.

91 67, 68 and 70/85, Kwekerij Gebroeders van der Kooy BV, Johannes Wilhelmus van Vliet, the Landbouwschap & Kingdom of the Netherlands v. Commission [1988] E.C.R. 219.

92 The Derbyshire County Council sold a piece of land to Toyota far below the market price. Bull EC. 7/8-1991 1.2.74.

93 Daimler Benz and Sony purchased buildings located on Potsdamer Platz also well below the market price. Agence Europe, April 15, 1992.

94 O.J. C68 [March 17, 1992].

95 J.O. 1967, 2311, quoted by Wyatt (1993) p. 525.

96 The case concerned the provision by the public authorities of a system for the purification water which would have rendered the building of such a system by the American chemical factory unnecessary.

In consequence of this rather feeble attempt by the Commission at laying down the rules for aids of such character, this has become another of those areas where no consistent policy has been formulated and pursued.[97]

ad e) Public undertakings

In spite of the significant structural differences in the economies of Western countries, it is generally true to say that state property, government contracts and public undertakings under Article 90 of the Rome Treaty, or undertakings having the character of a monopoly or possessing other exclusive rights constitute a determining factor in all these economies.[98] The Commission has been seeking to address this problem through the principle of market investor and by issuing the Transparency Directive.[99] The Transparency Directive aims at screening first and foremost those financial ties between public authorities and public undertakings which involve the granting of direct or indirect access to public funds and the effective employment of such funds by the favoured companies. When conducting its investigations the Commission is trying to establish whether i) the money granted makes up for operational losses; whether ii) working capital is made available to the recipient; whether iii) a grant or a preferential loan is provided; whether iv) any financial advantage is ensured by retaining profits, or by forgiving debts or normal interest rates; and whether v) undue advantage is given to the recipient by waiving (forgiving) rates and taxes.

Now it seems that the Commission's endeavour to attain a higher degree of transparency has been futile, since financial relations between the state and public undertakings have not become more transparent than before.[100] The decision reached in *Landbouwshap*[101] is usually looked upon as a milestone in this field. GASUNIE, the gas works introduced special rates for the provision of natural gas for agricultural producers growing hothouse vegetables. In its judgement the Court held that the Society of Agricultural Producers.(Farmers) and GASUINE concluded a separate price agreement,

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97 The Hungarian government is seeking to attract foreign investors by granting them tax relief or providing services on preferential terms or free. Act XXIV of 1988 provides for tax allowance and tax exemption for start-up companies. Article 12 of Act CIV of 1992 on corporate tax guarantees a maximum tax concession of 60% in the case of direct investment of foreign capital. 100% tax concession for a period of ten years may also be granted to large scale foreign investments, as it has happened in the case of Suzuki and General Motors: [Gov. Decree 62/1990 (23 March], Ford: [Gov. Decree 10/1990 (24 July)], Bank Leumi [Gov. Decree 1019/1990 (13 August)], and Agroferm [Gov. Decree 3/1990 (17 April)] in the past years.

98 This is particularly true in the case of France, although if Sweden and Austria also join the Communities, this problem may become even more relevant.

99 Dir. 80/723 O.J. 1980 L195/35: Commission Communication to the Member States applying the requirements of the Transparency Directive to public undertakings in the manufacturing sector O.J. 1991 C273/2; See also Article 222 of the Treaty of Rome and Dony-Bartholme (1993) pp. 410–412.

100 Wyatt (1993) Chapter 19.

101 67, 68 and 70/85, Kwekerij Gebroeders van der Kooy BV, Johannes Wilhelmus van Vliet, the Landbouwschap & Kingdom of the Netherlands v. Commission [1988] E.C.R. 219.

during which GASUINE did not possess full "contractual freedom", as half of its shares was held by public authority bodies. For companies operating in the industrial assembling sector, the adoption of a separate decision was thought to be necessary by the Commission.[102]

On the whole it can be ascertained that the Commission has been taking steps to manage problems concerning public undertakings, but in spite if this effort monetary movements between public undertakings and the state have still remained unregulated from the legal point of view.

ad f) The Commission's approach related to cyclical (temporal) application arises from perspicuous political considerations, but even so it undermines conceptual clarity. The Commission considers its policy on state aid as part of its activity aimed at maintaining the mechanics of the market. It approves or rejects the provision of aid in certain sectors depending on the prevailing economic conditions in the sector in question on the saturation of the market, and on whether there is consequential overproduction, etc. Naturally, in certain sectors sweeping changes may occur over a relatively short period of time. In 1973, for example the Commission endorsed British government plans for shelf mineral oil and natural gas mining, because in those days of critical oil shortage the newborn industry promised rich supplies for the future. However, by as early as 1976 the market had reached the point of saturation, and the Commission was no longer prepared to tolerate any support granted to the oil industry under Article 92(3). In *the Belgian textile-aid* case 84/82 [1982] the Advocate General held that given the then market conditions the Commission was not entitled to approve an aid package designed to support the textile sector.[103] The system of cyclical (temporal) application is otherwise logical and follows (logically) from the nature of the Commission's task, but on the other hand it amounts to dealing a mortal blow to "security in law".

The system of exceptions in EC law

The Treaty of Rome contains several exemptions from the strict categorical prohibitions laid down in Article 92(1). At the first level of exceptions the Treaty creates ex lege further exceptions. These can be divided into six groups, to which a seventh group can be logically linked. Article 92(2) enlists three categories:

102 Commission Communication to the Member States—application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector [O.J. C273, December 31, 1991].

103 84/82 Germany v. Commission [1982] p. 1504.

a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the produets concerned;[104]

b) aid to make good the damage caused by natural disasters or exceptional occurrences;[105]

c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in sofar as such aid is required in order to compensate for the economic disadvantages caused by that division.[106]

Article 42 contains special provisions in regard to *agricultural production.*

d) Article 42 itself suggests that the prohibition of aid does not apply in the agricultural sector at all, but Regulation 26/62[107] adopted by the Council also extended the applicability of the rules for aid to this sector.[108]

e) Articles 77 and 80 widen the scope of permissible aids in the area of transport.

f) Article 90(2) imposes restrictions on the application of Article 92(1) in regard to public undertakings.

g) By and large, different rules are to be applied in the coal and steel industry.

h) Although there are no special provisions in this respect, aids granted by the Commission and the institutions of the Community also fall outside the prohibitions under Article 92(1), similarly to the exemptions granted by the Council under Article 92(4).

In addition, Article 92(3) invests the Commission with the power to decide in relation to five other categories whether an aid granted may be considered to be lawful or not. "The following may be considered to be compatible with the common market:

i) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment [92(3)(a)];

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104 An example of this would be the granting of subsidies to manufacturers of basic foodstuff in order that the prices may be maintained. This could be detrimental to competition terms since it would exclude or restrict the distribution and sales of similar foreign substitutes. When in 1975 producers of hard wheat were subsidized in Italy, the Commission ruled that the maximized producers' price of pasta could not have been otherwise maintained, and that imports of pasta into Italy were insignificant. Comp. Rep. Points 160-129.

105 In 1976 following the earthquake in Friuli-Venezia Giulia low interest loans were given to those affected by the disaster, and similar loans were provided in 1977 after the devastating floods in Liguria Comp. Rep. 1978, Point 164. The category of exceptional occurrences is not applied in practice, though Wyatt (1993) p. 528 argues that aids provided in compensation for acts of terrorism could be dealt with under this rubric. The United Kingdom has created a special insurance mechanism providing full indemnity for victims of IRA terrorism. This issue has not been addressed by the Commission to date.

106 Following the unification of Germany the Commission has been seeking to eliminate this provision. Comp. Rep. 1990, Point 178. It is widely believed that after the unification the scope of the provision should have covered the whole of the territory of the former GDR.

107 O.J. 1962 L993.

108 Dec. 81/608 [O.J. 1981 L220/37] is quoted in Cowney, p. 256; in this sector subsidized petrol and heating fuel rates for land cultivation and animal husbandry have been the subject of a lot of controversy. The Commission has attempted to handle the problem by issuing certain guidelines.

j) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State [92(3)(b)];

k) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest [92(3)(c)];

l) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest [92(3)(d)];[109]

m) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission [92(3)(e)].[110]

It would be highly interesting to make a comparison between Article 92(3)(a) and 92(3)(c), which on the surface seem to be referring to the same thing. (It is interesting to note here, that there seems to be a considerable overlap between Article 92(3)(a) and Article 92(3)(c).) In spite of the similarities at first sight, there are essential differences not only between the two paragraphs, but also between the regions mentioned in these articles as 'cumulatively handicapped (underdeveloped) regions' and 'regions which are to be developed'.[111]

1. Whereas aid under Article 92(3)(c) may be permitted insofar as does not lead to the distortion of competition, Article 92(3)(a) fails to recognize even the occurrence of the distortion of competition as a disqualifying condition.

2. In case of 92(3)(a) the Commission favours a regional approach[112] while under 92(3)(c) it tends to focus on smaller regions and to employ a sectoral approach.[113]

3. *Article 92(3)(a)* is often referred to in order to 'justify' such industrial or agricultural projects which might as a result create more jobs or improve the standard of living in an otherwise economically depressed region. The issues examined by the Commission covered both *the regions of economic depression and the likely/potential effects of the subsidized activity.*[114] Under *Article 92(3)(c)* the Commission is empowered to approve sectoral aid granted by Member States to certain national industries. This kind of exception has become the most significant of all, because it permits—*while taking under close scrutiny solely the potential improvements unfolding in the subsidized sector concerned as a result of the provided aid*—the granting of state aid

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109 This provision was inserted by the Maastricht Treaty on European Union.

110 This article, which was originally Article (d) in the EEC Treaty, became Article (e) in the Maastricht Treaty. On the basis of this article, 8 directives concerning aid to shipbuilding have been adopted, which could not have been accepted on grounds of Article (c), as it specially covered operating aids.

111 These categories were introduced by Wishlade (1993) p. 144.

112 It deals with the so-called NUTS II regions which roughly correspond to the Italian region or the German Land. See Wishlade (1993) p. 144.

113 It uses the NUTS III region, the equivalent of the British county or the French dépertement as a territorial unit. Wishlade (1993) p. 144.

114 Philip Morris Holland; Dec. 80/1157 Re Investment Aids at Antwerp O.J. 1980 L343/38; and 296 & 318/82 Leeuwarder.

to the following areas: shipbuilding and repair, the textile industry, the production of synthetic fibres, car manufacturing, and the computer industry, etc.

4. The Commission measures against a Community standard when it permits aid under Article 92(3)(a), but in cases of 92(3)(c) aid a national standard is employed, through which support given to particularly backward, underdeveloped areas within a country is also made possible.[115]

Considering this system of exemptions it should not come as a surprise that state aids amount to a total of 100 billion ECU annually. Hence it should be even less surprising that repeated communications issued by the Commission in which they express their conviction that this problem should be handed over (to) the past as soon as possible, are generally received with mixed feelings. A good example of this is the Sixteenth Report on Competition Policy which runs as follows: *The Community's efforts aiming at the completion of the internal market by 1992 attach special weight and significance to the enforcement of the rules on competition and particularly to that of the rules on state aid.*[116]

Compensatory justification

In the light of the of rules discussed above there exists a seemingly strict prohibition which is toned down by vaguely defined criteria such as e.g. the reference to whether aid "affects trade between Member States". This is supplemented by a system of exceptions which—on the basis of certain often elusive criteria defying any attempts at formulating a precise definition—empower the Commission to elaborate and adopt any appropriate regulations and exercise its powers of discretion in these categories of aid. It should be noted that the Commission formulated such policies which are legally controlled, but enable it to exercise its quasi-discretionary powers, and which impose either absolutely no limitations or only within a narrow range on its activity to macro-manage the economy of the Community partly through centralized subsidy targets and partly through centrally provided aids.

The Commission supervises the application of Article 92(2) and controls the system of exceptions in Article 93(3):

"(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a member State;

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115 Comp. Rep. 1989, Point 133; 24/85 Germany v. Commission [1987] E.C.R. 4013; Wyatt (1993) pp. 531–532; Wishlade (1993) p. 144. See for more details under regional aid.

116 XVI Report on Competition Policy, 198 p. 135, and Completing the internal market COM (85) 310 pp. 39–40.

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest."

In the course of its practice the Commission was gradually giving shape to the so-called system of *compensatory justification.*[117] This system ensues from the approach of the Commission according to which any state aid per se is to be regaded as illegal, *except in cases where some special circumstances justify the contrary.* The notion of illegitimacy springs from the underlying perception of the Commission that any state aid must be inevitably harmful to competition, consequently the Commission may permit aid on condition that some special consideration or some greater benefit ensuing from—and made possible by—the provided aid makes up for the injury to the conditions of competition that has been caused even though the reasons for the granting of aid have been justifiable. It follows from this that the detailed study of each particular case is required whether it concerns already existing or prospective aid. The requirement of compensatory justification first appeared in the Commission's opinion in Intermills,[118] and this statement has become the pillar of state aid policy for the whole Community.

A Comparative Analysis of State Aid in European Community and Hungarian Law

Although it is beyond the scope of our present study to perform an exhaustive comparison between the relevant legal institutions, taking into consideration the normative rule and the practice associated with it a comparison of the EC rules and Hungarian rules on aid seems inevitable in some crucial areas. First we have attempted to classify different forms of aid on the basis of logic and the rules of law which however sometimes seem to defy logic. After the classification we are going to embark on a more difficult task, that is, a comparative analysis covering the most significant areas.

It seems a logical necessity to categorize different forms of aid according to a) *direction* depending on whether the aid is intended for *the domestic or export market*; and b) according to *function* depending on whether it is designed to *maintain, sustain or transform* the recipient. The classification employed by the international trade rules (GATT) recognizes mainly two categories: *direction* (export or domestic) and *sector* (agriculture, transport, coal, textile and synthetic fibres), while in the Community practice certain preferred aims such as environment protection, regional development, research and development play a vital role in the appraisal of aids. It must be pointed out that these categories are artificially imposed and mutually overlap. In practice the simultaneous inclusion of all categories in the assessment of one particular case is far from being an isolated incident. This is what happened on account of the support given to the seriously depressed NUT II. regions, when the Commission did not exclude the permissibility of

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117 Mortelmans (1984).

118 323/82 [1984] ECR 3809.

granting aid to such huge labour absorbing industries as the textile sector, which were otherwise going through a critical time.[119]

I. Aids grouped according to direction

Export subsidies[120]

In Community rules on export subsidies a crucial distinction is made between external rules and inner rules. Export subsidy rules relating to third countries are to be found in the GATT, in the Subsidy Code and in Council Regulation 2423/88.[121] Unfortunately, none of them provide clear definitions of what should qualify as an export subsidy, since Article VI(3) of GATT makes only vague references to it, while the Subsidy Code refers to subsidies "*dependent on the export activity*". The Subsidy Code offers an impressive list[122] of definitions which specify the range of export subsidies. This list was also included in Council Reg. 2176/84 and in ECSC Decision 2177/854, and is described in detail below:

1. Direct export subsidies provided e.g. by Brazil to help export women's shoes[123] and certain steel products.[124]

2. Certain foreign exchange regulations which enable the exporter to change the earnings from export to its own currency at a conversion rate higher than the official rate reported to the IMF.

3. Transport subsidies which generally force transporters to apply lower rates for exports and ensure them some kind reimbursement in return.

4. The provision of goods and services at favourable rates are generally considered as subsidies when these are made available for the exporter below the domestic and world market prices. The maintenance of a double price system may have such consequences e.g. in the petrochemical sector where the raw materials may be sold at various prices on the domestic market. At the same time this type of subsidy is difficult to catch. The main reason is that if it is not specifically the subsidized product that is exported, it is very difficult to prove that the subsidy has been provided in order to boost export.[125]

5. The exemption of a product from direct or indirect taxes and the refund of import costs raise rather complicated assessment problems. The refund of a direct tax shall be

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119 See for example in connection with Mezzogiorno.

120 Adamantoupulos gives an excellent analysis of the external aspects of export subsidies and aids to home industry (producers). pp. 442–446.

121 Council reg. on protection against dumped or subsidized imports from countries not members of the European Community O.J. NO. L. 209/1.

122 It means that the list is not taxative or exhaustive, and other activities may also qualify as subsidies. See Beseler p. 133.

123 Dec. 81/911/EEC O.J. L327/39 [January 14, 1981].

124 Rec 2129/83/ECSC O.J. L205/29 [June 29, 1983].

125 Beseler p. 133.

considered as an explicit subsidy, whereas indirect taxes qualify as subsidies insomuch as the refund exceeds the amount of tax which has been actually paid. The refund of direct taxes may extend to embrace the direct taxes levied on the ingredients incorporated in the price.[126]

6. Export credit guarantees and warrantees qualify as subsidies provided the system can obviously no longer sustain its economic viability from its earnings and can be kept in operation only through the provision of state aids.

7. Export credits are regarded as subsidies insofar as the government transfers such credits to third parties at a lower price or interest rate than the prevailing interest on the international money market, and thus the maintenance of the credit system entails further budgetary expenditures.[127] These rules may be applied in the relations of Hungary and the Communities insofar as the Association Treaty is not applicable.[128]

The inner rules on export subsidies, that is the rules to be applied within the the Customs Union, sharply deviate from the external rules. This can be revealed from a letter sent by the Commission to the Member States in 1987, in which they were warned not to continue the practice of exporting their products to 'dummy' phoney companies in third countries in such a way that the products in question were shipped back on paper to the country of origin, which in reality they had never even left. Thus this practice amounts to the circumvention of the prohibition provided for in Article 92(1). The rules on export subsidies within the Community contain explicit and unambiguous prohibitions in this respect.[129] In most cases, Greece has occupied the centre stage in the battles fought over this issue. After the accession of Greece, the other Member States were supposed to have discontinued the subsidization of exports to Greece. When some Member States failed to comply the Commission initiated proceedings against France.[130] After its accession Greece itself was obliged to eliminate export subsidy schemes concerning export from Greece to the other Community Members only by 1990.[131] However, in 1991 the Commission commenced proceedings before the Court on account of an export subsidy provided by Greece in the form of direct tax refund.[132] In the *Commission v. France 6 & 11/69 cases* referred to earlier, the Court declared a preferential export discount rate illegitimate aid.

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126 The GATT has adopted special rules to address this problem. [Guidelines on physical incorporation adopted by the GATT Committee on Subsidies and Countervailing Measures/GATT Doc. No. SCM/68, October 31, 1985]. The EC practice is also very extensive. See Rec. 375/83/ECSC O.J. L45/11, which states that the depreciation of investment goods is not included/incorporated in the cost of the product and therefore it cannot be refunded/reclaimed.

127 See the opinion of OECD on this question, OECD Doc. No. TD/Consensus/82.41.

128 For more details see the regulations excluded from the application of Article 62 of the Association Treaty.

129 XIth Report on Competition Policy, Point 247; XVIth Report on Competition Policy, Point 257.

130 XIth Report on Competition Policy, Point 247; XVIth Report on Competition Policy, Point 258.

131 XVIth Report on Competition Policy, Point 258.

132 XIXth Report on Competition Policy, Point 202, XXth Report on Competition Policy, Point 276.

Depending on the rules to be adopted in the Association Council, Hungary may not be allowed at all or may be permitted within certain limits though, to grant subsidies to its producers in order to boost exports to Community countries, unless a mechanism very similar to the one adopted in the case of Greece is going to be elaborated for Hungary. This, of course, equally holds for exports from the European Community to Hungary.

II. The classification of aids according to function

Aids can be categorized on the basis of the purpose they are designed to serve, which has proved to be an underlying principle in the approach applied both by the Court and the Commission in their evaluation of aid. Those subsidy schemes which are solely intended to cut the operating costs of the subsidized economic entity without making the granting of aid conditional upon a better adjustment to the market conditions or upon a revision of the operations and that of the inner structure of the undertaking in question, are called operational aids. Other aid projects assisting companies in adjusting to the market are regarded as aids granted for the purpose of restructuring. There exists a third group of aids, named emergency or survival aids, which are employed to prevent a company in serious crisis from going bankrupt. An analysis of how these different types of aid are treated in Community law is the subject of the sections to follow.

Operational aid

The provision of operational aid has received perhaps the strongest criticism from the Commission, since "*it produces immediate effect on operating costs and prices*".[133] The Commission has refused to accept references to either cyclical or conjunctural difficulties as sufficient grounds for this type of intervention in the market, and holds the view that operational aids work to the definite disadvantage of economic actors on the market, since such aids pre-empt any willingness to adjust to the market situation. The Commission has remained adamant that aid is unacceptable even if the recipient goes broke in its absence but it has shown more flexibility towards certain regional aid projects granted to areas of serious economic deprivation and areas suffering most from recession and viewed such aids as legitimate.[134]

Aid granted for (restructuring) authorized to promote economic recovery

If the parties reason that aid granted to individual companies and certain products will be instrumental in furthering the efforts of the recipient to adjust to the changed market

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133 Commission Dec. 82/744 of October 11, 1982, O.J. 1982 L315/23 on p. 24, quoted by Evans on p. 93.
134 O.J. 1988 C212/2 quoted by Evans on p. 94; The XVIIIth Report on Competition Policy by the Commission (1989) p. 147 notes: "... given the particularly grave situation/developments these regions are facing, the Commission has decided to permit the provision of operating aids in certain situations".

conditions, the Commission seems more willing to grant approval than in the case of operational aids. At the same time ample proof of the company's efforts at restructuring must be provided for the Commission with special emphasis on the situation of the relevant sector or region which necessitates the restructuring by launching new products of higher quality on the market and by decreasing the market share. When the Belgian government decided to grant 400 million Belgian francs in aid to *Noviboch*, a company manufacturing sanitary goods the Commission approved the aid on the grounds that the aid in question had promoted the company's efforts at introducing fundamental structural changes in an industry suffering from serious overproduction, and also because "the output of the restructured company was bound to be 20–30% less than that of its predecessor".[135] In *Leewarder* the fact that the aid had been granted in order to facilitate the restructuring of the company, weighed heavily on the final appraisal of the Commission, which considered the decline in output effected brought about by the granting of aid as sufficient proof of the recipient's reasoning.[136] By contrast, in *Executif Regional Wallon & Glaverbel SA v. Commission*[137] the Court did not accept the arguments of the recipient which claimed that the provided aid constituted aid for the purposes of restructuring for the simple reason that it enabled the company through the introduction of new technology to enhance its competitiveness on the market and to emancipate itself from its unilateral dependence on Japanese technology.

Survival (Emergency) Aid

In a letter sent to the Member States on January 24, 1979, the Commission laid down the essential prerequisites for the justifiability of emergency aid.[138] According to this letter survival aid constitutes financial support given to a company in a critical economic situation for remedial purposes so that the company can be kept alive, so that the operation of the company can be maintained until the crisis has been properly tackled. Even if these conditions are met, this type of aid—povided it has been previously notified to the Committee—may be legally granted only *for a maximum period of six months, at the normal interest rate, and in the form of cash*, on the condition that *the support provided does not have an unfavourable impact on the economic situation of the other economic actors operating in the same sector.* In *Intermills*, as the evaluation of the Commission noted, an aid granted by the Belgian government to a paper-making firm was used partly for restructuring and partly for remedial purposes. The Commission held that the first type of aid was well-grounded due to fierce competition from foreign companies, but prohibited the provision of survival aid. The European Court approved

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135 Com. Dec. 87/423 O.J. 1987 L228/39, p. 40.

136 296 & 318/82 Kingdom of the Netherlands & Leewarder Papierwarenfabriek BV v. Commission [1985] E.C.R. 809, p. 825.

137 Cases 62 & 72/87 [1988] E.C.R. p. 1753.

138 Quoted by Evans on p. 96, and see also Boussac Saint Fréres O.J. 1987 L352/42, p. 48.

the complainants' claim that the Commission had been unable to prove during the proceedings that "... *the market activity of the complainants ... may have such an unfavourable impact on trading relations, which renders the disappearance of the firm more favourable than its salvage*".[139]

In 1987 another decision concerning a credit by the Greek government made it clear that survival aid is intended to serve as a remedy to alleviate the temporary difficulties of otherwise economically viable undertakings. The provision of such aid may under no circumstances create such a situation in which the market position of the recipient is considerably strengthened, and in which through the provision of aid, the company in question fares better than it would have otherwise done if the crisis had not occurred.

III. The classification of aid according to its aim/purpose

The following sections make a parallel study of the Community and Hungarian rules currently in force. Four different target areas are to be discussed below: regional development, the alleviation of the unemployment problem, the promotion/encouragement of the research and development activity, and finally the support of small- and medium-sized enterprises which has already been covered above in connection with the *de minimis* rule. Before embarking on categorizing aid according to the intended objective, which, of course, in many respects overlaps other the approaches detailed in the preceding sections, one particular, factor unmentioned in our study so far, but consistenly recurring in the Commission's opinions, needs to be treated with special care/needs to be given special attention. The Commission treats these areas as *aims which need to be supported* on the grounds that in these cases the *impossibility of the market* situation, that is *the inability of the market to attain the desired results*, makes the permission of state intervention absolutely necessary.[140] On establishing the necessity of aid, what remains to be done is to decide which category of aid under Article 92(3) it belongs to. This is only a problem of secondary significance, though.

Regional aid

a) Regional aid or (regional development aid)[141] raises serious problems for the Commission which has to take into consideration both the principles of free market competition and those of solidarity when taking decisions on these issues. The Commission is obliged to build up the market, allowing for and definitely encouraging the adoption of regional policies, while at the same time watching out for any attempts

139 [1984] E.C.R. 3809, p. 3832.

140 See infra p. 27.

141 The Commission's view is outlined in Principles of Coordination for regional aids [O.J.C. February 13, 1979].

at disguising operational aid as regional aid.[142] This task is rendered even more difficult by the fact that traditional industries, but even microchip manufacturers, which are increasingly dependent on raw materials, are usually concentrated in certain regions, which means that any aid given to these regions amounts to sectoral aid granted to certain industries and vice versa. The regional aid policy of the Commission was very similar to the American approach for over a considerable period of time, and Brussels conceded that regional aid might lead to the dislocation of investment and the distortion of competition terms by improving the return rate of the recipient simply because an undertaking had previously established itself in a certain region. While the American view has remained unchanged[143] and considers the entire regional policy of EC as countervailable measures, unless it concerns areas which correspond to Greece, South Italy, Spain or Ireland in size; the perception of the European Community in respect of regional aid has undergone a complete change.[144]

The policy guidelines applied by the Commission in these areas are to be found in three of the Commission's Communications, in a Resolution of the Representatives of the Member States,[145] and the Commission's Annual Report on Competition Policy also contains additional information on the subject. However, it should be emphasized here that these guidelines (rules) above are not rules of law, hence they are not legally binding on the Commission. The following aspects of the Commission's policy on aid can be outlined stressed on the basis of the Communications:

i) *Almost all kind of operating/operational aids are prohibited.* This policy is consistently pursued by the Commission and the 1978 Communication demanded the freezing of the provision of this type of aid. In spite of this, since the mid-eighties marked changes have come about in the treatment of operating aids.[146] As the Commission itself publicly announced "... *the accession of Spain and Portugal, following Greece ... necessitates that the Commission reconsider its policy on regional aid.*"[147]

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142 Wise & Gibb, Single Market to a Social Europe, The European Community in the ene [Longman, Essex 1993] pp. 232–236.

143 Adamantoupulos p. 450.

144 The external rules of both the United States and the EC concur/are in agreement in that a review of each individual case is required in respect of regional aid. See US Omnibus Trade and Competitiveness Act of 1988 Sec. 1312 and the EC Commission: Soya meal from Brazil O.J. 1985 L106 [April 18, 1985]. p. 19; The American Department of Commerce views aids given by the European Investment Bank and the European Regional Development Fund as countervailable subsidies, see Adamantoupulos p. 449. As regards the inner rules of the EC, Advocate General holds the view that "... it depends on the case in issue..." what decision the Commission is going to arrive at.

145 Resolution of the Representatives of the Member States on general systems of regional aid of October 20, 1971 J.O. 1971 C111/1; Communication of June 23, 971 [J.O). 1971 C111/7) Communication on Regional aid systems [O.J. 1979 C31/9], Commission Communication on the method of Application of Art 92(3)(a) and (c) to regional aids [O.J. 1988 C212/2]. These rules overlap to a great extent and also modify one another.

146 In respect of Article 92(3)(a).

147 XVIth Report on Competition Policy 1987, p. 178.

In reviewing its policy the Commission went so far as to to accept the granting of *operational aid* in areas where that constituted the only means of rectifying the abnormally low standard of living and unusually high employment rate.[148] What is highly significant is that the standards of living and employment were to be measured against a Community-wide standard.

ii) In the Commission's view such aids must be made transparent or must not be allowed to continue.[149] Those aids which cannot be measured by currently used methods or cannot be expressed in terms of numbers are not considered transparent by the Commission.[150] The Annex to the Communication enlists methods for measuring job creation, loan guarantees, etc. to facilitate easy comparability.

iii) The principle of regional specificity is defined in Article 9 of the Communication which sets out the criteria for establishing regions eligible for aid:

a. The region concerned may not constitute the whole national territory of a country excepting Ireland and Luxembourg.

b. The aid regimes must provide a clear definition of the limits of the area to which the aid is granted.

c. Aid may not be given to smaller isolated areas having virtually no impact on the development of a region.

d. The state aid must be adapted in form, intensity and duration to what is required/ to the sought-after result.

e. It should be clearly indicated how the intensity of the aid varies in respect of the different areas within the region.

f. Support given by the EBRD and the provision of state aids must be coordinated.[151]

iv) Aids must be granted with regard to their possible sectoral repercussions.[152]

As pointed out above, the Commission is authorized on the basis of Articles 92(3)(a) and 92(3)(c) to pursue regional policies or permit national projects for regional development. Aid under Article 92(3)(a) may be given to areas of serious economic depression, whereas Article 92(3)(c) covers areas with more general development problems. The granting of aid for the purposes of Article 92(3)(a) is subject to the proviso that in respect of the NUTS II. regions concerned the per capita gross domestic product in terms of buying power does not exceed 75 percent of the Community average for three consecutive years prior to the granting of aid. In these regions the ceiling of aid intensity may amount to 75 percent of the total (initial) investment. Regions falling within the ambit of Article 92(3)(c) are measured in terms of national indicators: the per capita gross domestic product[153] must be at least 15 percent below and the unemployment rate

148 This mainly concerns the Italian Mezzogiorno.

149 VIth Report on Competition Policy 1976, Points 194 and 206.

150 Butterworths VIII [243].

151 See infra for more details.

152 Butterworths VIII [245].

153 This is in fact a GDP/GVA/gross value added ratio.

be at least 10 percent above the national average. In order to view the region from a Community perspective, at the next stage the Commission gives an evaluation of the situation of the region in relation to the national norms and the Community standard on the basis of several mathematical indicators.[154] The Commission's judgement is based on the policy (principle) of *wider disparity*, that is, the *principle of double discrepancy*, which means that the most underdeveloped regions of the more developed EC countries must be relatively worse off in relation to the national standard than regions in the peripheral and most backward countries.[155] The evaluation of the Commission also takes account of the structure and trend of unemployment, as well as the direction of demographical changes, although the application of these methods of measuring aid is not compulsory. In the event that all the above criteria apply, the Commission may authorize an aid of maximum 30% intensity for regions with general development problems.

The Commission's interpretation of aid for the purposes of Article 92(3)(c) is well illustrated in the *Germany v. Commission* case,[156] in which the Commission examined the legality of an aid project for North Rhine-Westphalia. The Commission argued that an aid may be regarded as legitimate, provided that "*the aided region is struggling with such economic difficulties which are relatively serious when measured against a Community standard; in the absence of the aid granted to the region the market forces would not be able to eliminate these difficulties; and the granting of aid does not disturb competition in certain sectors to a greater extent than necessary*".[157] The Commission's evaluation clearly demonstrated that the economic status of the aided region was rather satisfactory compared with other regions within the Community and the unemployment rate was not high either.[158]

The Commission policy concerning Article 92(3)(a) and to some extent Article 92(3)(c) has always been the subject of heated debates.

a. The eligibility of certain areas and territories for aid is *unduly determined by strictly quantitative criteria*, and thus certain areas obviously badly in need of support have no access of such remedy. If there is an exodus of labour force from an agricultural region, for example, the region is not likely to have any unemployment problems, and the GDP indicators might not show any significant deviation from the norms, as was shown in the case of France. On such grounds instead of supporting the southern region of the country, France ought to provide aid to the county of Ile-de-France struggling with

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154 See the 1988 Communication for more details.

155 XVIII Report on Competition Policy 1989, p. 148.

156 248/84 [1987] E.C.R. p. 4013.

157 An example of this would be [VIth Report on competition Policy] Sicily, a region " where the net income per capita ranges from 54% to 66% of the national average ... and between 35% and 42% of the Community standard ... The population figures have dropped ... the rate of migration from the region is higher than in any other province in Italy ... the unemployment situation is poor...". See Commission Dec. 88/318 [March 2, 1988] on aid to Mezzogiorno O.J. 1988 L143/36, p. 40.

158 On the basis of per capita GDP and structural unemployment figures.

a high unemployment rate due to the influx of immigrants and pushed into the background by French regional policy.[159]

b. When specifying areas with general development problems, the NUTS III. regions are not suitable for the management of industrial difficulties. It is obvious that that the plight of certain isolated industrial areas smaller in territory than the NUTS III. region, cannot be assessed within this framework on account of the compensatory impact of the region unaffected by the crisis.

c. Even if an area meets the requirements for eligibility for aid on a purely numerical basis, the Commission still retains the right to exercise its discretionary powers in respect of the permissibility of the aid in question. This leads us to the conclusion that the normativeness of the whole legal regime/system based on the Commission's communications, guidelines and letters can be seriously questioned and the indicators serve rather as a means of justifying approval or rejection.[160]

d. Another important feature of the regional aid policy is that the regional policy of the Communities and the national aid policies are not coordinated.

In practice this means that in respect of regional policy, the limits of areas qualifying for aid under points 1, 2 and 5b, and those of the areas specified in Article 92(3)(a) and (c) do not coincide, and thus the areas eligible for aid granted by Member States do not quite correspond to the territories which are the focus of the Community's regional policy. A major consequence of this discrepancy may be that certain areas are aided only within the framework of the Community's regional policy, while others are supported from state funds, or in extreme instances some areas might be accorded financial assistance from both sources or by neither of them, which in itself might entail a senseless waste of resources.[161]

vi) The policy pursued by the Commission in respect of the appraisal of regional aid is underlined by the so-called coordination of interests principle. An illustrative example of this is the approach adopted by the Commission in connection with an aid project for the Miesbach area, when it observed:[162] "*... it can be presumed that in none of the labour market regions will the aid to be granted affect, if it should have any effect, commercial revenues from the tourist trade contrary to the common interests*". *(In none of the labour market regions will the aid to be granted have an impact, if any, contrary to the common interest, on commercial revenues from the tourist trade.)*[163]

Within the ambit of regional policy attention must be paid to regional aid projects granted *with the declared purpose of job creation* by way of tax relief. As pointed out in the Sixteenth Competition Report such aids do not encounter any opposition from the Commission.[164] The Commission also made it manifest that an aid cannot be regarded

159 Wishlade (1993) p. 145.
160 Wishlade (1993) p. 146.
161 Wishlade (1993) pp. 146–149.
162 Commission Decision 87/15 O.J. 1987 L12/17, pp. 25–26.
163 Evans p. 100.
164 See p. 138.

as legitimate on the sole grounds that the aid project itself has contributed to the maintenance or creation of jobs.[165]

Talking of regional policy, aid granted to spur investment, investment zones and the so-called "general aid projects" also need to be discussed here. On these issues the Commission does not seem to have a clearly defined policy to follow. Generally, in the majority of cases the Commission shows no willingness to approve comprehensive aid schemes and by so doing give its preliminary consent to each single aid plan, but rather it comes to a decision on the basis of a separate appraisal of each subsidy instead. After the notification of an aid plan the Member State is required to notify any further plans to grant aid on each single occasion.[166] In recent times "company face-lifting" related to privatization has been under strict scrutiny by the Commission.[167]

In 1991 the Commission made a thorough examination of aid accorded by Treuhandanstalt to the vehicle industry and the Carl Zeiss Jena Works partly for the purpose of preventing and eliminating damage to the environment and partly in the form of the remission of liabilities incurred during the Honecker era. In this case the Commission held that such aids may be permitted since none of the economic actors involved are given undue advantages. Furthermore, the Commission stated that it demands notification of any open tender for the acquisition of a company not being awarded to the highest bidder.

The Greek privatization process which was stopped at the end of October, 1993, had previously won the approval of the Commission in 1991 which permitted aid in the form of remission of debts and conversion into shares. It laid down as a rule that the privatization of an undertaking must take place by way of an unconditional and open

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165 In 1982 the Commission endorsed a British subsidy scheme for a time sharing program, (XIIth Rep., Point 197), and partly supported a French initiative aiming at creating and maintaining jobs, but the maintenance of jobs was found to be unlawful by the Commission (XIIth Rep., Point 196). In 1983 a British subsidy scheme to provide training for juveniles was permitted to continue by the Commission for a year (XIIIth Rep., Point 268), and the Commission partially approved an aid plan marking out special employment zones and granting tax exemption for a period of 15 years to companies establishing themselves within these areas (XIIIth Rep., Point 296). In 1985 the Commission approved of the extension of the British youth training program (XVth Rep., Point 226). In 1986 it permitted an Italian subsidy scheme for the prevention of unemployment within cooperatives (XVIth rep., Point 254), and after some hesitation, though, it supported a Dutch aid scheme to decrease social security tax (contribution) to be paid by undertakings taking on those who had been out work for a considerable length of time. In 1990 the Commission accepted the extension and modification of this aid scheme (XIXth Rep., Point 197). In 1991 it approved a German indemnification scheme providing financial help to the long-time unemployed, and also a Spanish project for retraining (XXth Rep., Points 282–283. See also Evans, p. 108).

166 For instances of this see XVth Report on Competition Policy, Point 202; XVIth Report on Competition Policy, Points 205–209; XVII Report on Competition Policy, Points 206–210; XIXth Report on Competition Policy, Point 163; and XXIst Report on Competition Policy, Points 240–248. The opposite of this is well exemplified by the XVIIIth Report on Competition Policy, Point 219, where the whole scheme had been approved in advance, as the sums to be distributed within the framework of the scheme were so irrelevant that they could not have a significant impact on the common market.

167 XXIst Report on Competition Policy, Points 248–250.

tender based on transparent terms and by involving independent experts in the assessment of the submitted bids. In addition, the Commission must be specially notified of the privatization of major undertakings.[168]

A) The Hungarian rules on aid for regional development[169] specify the areas eligible for aid primarily on the strength of unemployment figures.[170] To qualify for aid the unemployment rate of the area concerned must be two times higher than the national average[171] or the restructuring plans of the government's new economic policy must entail the threat of job losses on an enormous scale. The provision of aid is approved when it is targeted on the creation of new jobs, investments in infrastructure, and such development projects which stimulate entrepreneurial activity and encourage restricting efforts in the rural areas. Aids are designed to supplement local resources, are limited in intensity,[172] and the economic viability of the prospective investment is also taken into account before the aid plan is approved.[173]

The most significant form of regional aid is provided through local governments to serve as a target grant. Local governments may submit their applications for funds allocated by the Parliament for special purposes. *Local governments* also bear the ultimate responsibility for the distribution and management of the money granted by the state.[174] The *Personal Income Tax Bill* provides for tax relief for backward areas of economic depression,[175] and the rule on the *Central Technical Development Fund* requires a lower contribution from economic entities applying for support from state funds and being located in regions of serious deprivation.[176] The so-called *Road Fund*[177] accords a preferential treatment to backward regions. Private initiatives aiming for regional development programs such as the modernization of the drinking-water supply, the establishment of the foundations of infrastructure, etc. may also qualify for state aid.[178] In 1993 the *Employment Fund* presided over 1500 million HUF from contributions by employers and from budgetary contributions. The granting of aid for job creation is made conditional on the number and stability of the jobs created, and on meeting the requirements concerning the initial costs per workplace. Even so the support may only

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168 XXIst Report on Competition Policy, Point 251: in the course of the Portuguese privatization process practically similar conditions prevailed.

169 Act LXXXIII of 1992 and Gov. Decree 75/1991 of June 13, in the Hungarian Official Journal 64/1991.

170 Article 51/4/ of Act LXXXIII of 1992 empowers the Parliament and the Government to specify areas which are to participate in the regional aid scheme.

171 This figure is approx. 22%.

172 Aid may amount to max. 20–50% of the total investment and to approx. 500.000 HUF/per job at the most.

173 The 1993 state budget allocated 20 million HUF!!!, that is, $US 20.000 for regional aid, the equivalent of the cost of creating 40 jobs. In 1991 this amount was granted to the county of Borsod-Abaúj-Zemplén.

174 Act LXXXIX of 1992; Act XXXIV of 1992; Act LIV of 1992; Act XXI of 1992.

175 Act LXXXIX of 1991; Act CIV of 1992.

176 Enclosure 2 of Act IX of 1988.

177 Act XXX of 1992.

178 Law-Decree 28 of 1977 on water management companies and Gov. Decree 89/1991 of July 12.

be provided as a supplementary device. For start-up small- and medium-sized enterprises loan guarantees are provided by the *Development Fund for Small Enterprises.*[179]

On the whole Hungarian rules on state aid should not give cause for particular concern as they do not seem to be exhibiting any notable deviation from the effective European Community law in this respect. It cannot be ruled out, of course, that in practice serious conflicts may occur/ensue (due to differences in interpretation).

Environmental Protection

At the outset the Commission envisaged that over a six-year period of transition state aids towards environmental protection will be accorded but on the expiry of this period such aids will be treated along the same lines as other prohibited forms of aid. This approach was enunciated in the Guidelines issued by the Commission with transitionary effect which unequivocally emphasized the necessity for fully implementing "*the polluter pays*" principle within the shortest possible time, so the exceptions to this principle were in fact considered only temporary.[180] The Commission clearly views the protection of the environment as one of the common European interests which need to be defended and is even more ready to approve aids of such character than aids designed to serve other purposes. According to the *Single European Act "The Community act towards environmental protection is based on the principle that preventive measures must be taken so that the damage is possibly repaired/made good at the source of its origin and that the polluter shall pay."* Within this legal framework the Commission has adopted the principle of "*the polluter shall pay*"[181] and has applied it with strict consistency in practice unless it was revealed that in consequence of the *inadequacy of the market* and in the absence of aid the economic actors would have had to encounter great difficulties in their efforts at making the necessary adjustments.[182] The Commission Guidelines indicate that only already effectively operating companies may qualify for support, so new undertakings must be established in compliance with the relevant standards. The provision of aid must be degressive, spread over a period of certain length, and must be covered by such a rule of law which specifies what kind of investment is required for the

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179 Gov. Decree 98/1992 of June 17.

180 IVth Report on Competition Policy (1975) p. 180. The force of the guidelines was extended in 1980/Xth Report on Competition Policy 1981, pp. 157–158, XVIth Report on Competition Policy 1987, pp. 171–172, 176; The "Community framework for state aid towards environmental protection" [Letter SG(93) D/709, January 18, 1993] extended the force of the relevant rules for another six months. See also the replies to the written questions submitted by MPs Bertrand, Jahn and Cousté [O.J. 1975, C28/24; O.J. 1975, C86/40-41; O.J. 1978, C164/24-25].

181 This principle is further underlined in the Fourth Program of Action on the Environment [O.J. 1987, C328/1 and p. 4]. Grabitz (1989) pp. 438–439 suggests that the phrasing/definition of the Sinle European Act not allowing for/accommodating any exception would/might have rendered any exception unlawful. He notes, however that neither the guidelines nor the other Commission acts may be regarded as legal acts, they should be seen as preliminary indicators of the Commission's reaction instead.

182 Evans p. 103; Grabitz (1989) p. 430.

protection of the environment.[183] The latest Commission Guidelines imply that environmental aid may be granted under Article 92(3)(b) in the form support given to promote projects of common European interest, on condition that

a) it contributes to further development and to the implementation/introduction of new standards for the protection of the environment,[184]

b) it is granted as a supplement to local resources, where the intensity of aid may not exceed 15 percent of the value of the aided investment,[185]

c) if is accorded to undertakings already in operation at least for two consecutive years prior to the day when the relevant standard takes effect,

d) it guarantees that the polluter shall pay for the damage inflicted and that the aid will not have a favourable effect on the polluter's competitive position by allowing him to pay not only the costs related to the protection of the environment, but also the normal costs of replacement as well as the operating costs".[186]

The subsidiary legislation of the Council and that of the Commission seems to harmonize with the approach of the Commission Guidelines. The EEC Council's Directive 75/439 concerning the storing oil residues authorizes aid for collecting refuse oil.[187] The Council Recommendation 77/123 was designed to ensure the supportability of reasonable energy consumption.[188]

B) In Hungary Chapter IV of Act No. LXXXIII of 1992 provided for the setting up of the Central Fund for the Protection of the Environment, the funds of which are made up of pollution fines, taxes on environmentally hazardous activities, product fees[189] and budgetary contributions. The Fund provides support in the shape of direct remittance, loan guarantee and survival (emergency) aid.[190] Although the principle of "the polluter pays" is not plainly manifested in this rule, it incorporates other principles outlined below occupying a central place in the Commission's Guidelines.

One of the principles underlines that the provided aid must be supplementary in character (the recipient's own resources must reach 30–60% of the prospective aid), while

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183 See Guidelines Bull EC 11 1974, Point 2115, and Cownie (1989) p. 257.

184 The IVth Report on Competition Policy even stipulated that the implementation of new and costly environmental standards must constitute the grounds for the justification of the provision of aid. See also Grabitz (1989) p. 431.

185 The IVth Report permitted an intensity of 45%, but the total amount was to be spent on purchasing brand-new and more environment-friendly equipment, filters and other equipment specially designed for the purpose of environmental protection/ and other equipment specially designed to protect the environment.

186 Xth Report on Competition Policy 1980, p. 16, Member States are obliged to notify such aids annually.

187 O.J. 1975, L 194/31.

188 O.J. 1977, L 295/3-4.

189 For instance fuels and packing; the article by Grabitz quoted earlier proves the permissibility of exactly these kind of fees.

190 Article 31(a).

the other emphasizes that the aid must promote progressive development and economic recovery.[191]

A major difference between the Hungarian and the Commission's approach in this respect is that the Hungarian law has not adopted other aspects of the Commission's Guidelines, and even favours support given to new undertakings against fully operating companies.[192] Significantly, Hungarian rules on aid prohibit the granting of operating aid disguised as aid provided for the purpose of environmental protection.[193]

Research and Development

In sharp contrast with its approach to regional aid, from the very beginning the Commission assumed a positive attitude towards the granting of aid for research and development. Since then it has accepted several such aid projects within the meaning of Article 92(3)(b) on the grounds that they serve a common European interest. A similar reasoning induced the Commission to accept the HD-TV (high definition television) project and AIRBUS, a combined design and manufacturing project for building passenger aircraft, both of which as the Commission's evaluation pointed out, significantly contributed to the promotion of further technical development.[194] However, in the case of an aid provided to the car manufacturing company, Peugeot by the French government for the production of new type of assembly lines and that of a new gear-box 20% lighter than previously, the Commission ruled that regardless of the fact that the French government's failure to notify the aid would have rendered it illegal in any event, the provided aid in question was unlawful. The Commission demonstrated that the aid in question could not be brought within the ambit of any of the provisions in Article 92(3), as the conditions provided for in the article did not simply apply in the circumstances. On examining the complainant's arguments insisting that the support was aimed for innovation, which was a proclaimed common European interest, the Commission emphasized that neither the promotion of French industrial interests nor the partial streamlining of an economic sector may be regarded as a common European interest. The Commission's inquiry also revealed that the so-called newly and only partly implemented innovations financed from the provided aid, had been embraced by Peugeot's European competitors years before, so the changes had brought little benefits from the point of view of quality or automation. Still the provided aid enabled Peugeot

191 This means that a conservative investment may not be financed in such a way.

192 Article 35(3); Article 35(16) cannot be interpreted as a restriction.

193 Article 35(2). Several forms of tax concession are designed to support environment protection or activities directly related to it. Act LXXIX of 1991 provides for tax concession to land cultivation aiming for land amelioration. [Art. 6 & 7]; and 17/1992 of 17 June [by the Min. of Agriculture); Act LXXXII of 1992 provides for customs and tax concession to motor cars using unleaded fuel (Art. 8]. Gov. Decree 100/1989 endorses the recultivation of oak forests devastated by bacterial contamination.

194 XVIIIth Report on Competition Policy 1989, p. 151.

with controlling shareholdings in Citroen to increase its total European market share from 11.4% to 13.1% within eighteen months.[195]

C) In the area of research and development the Hungarian legislation established three separate funds, namely the *Central Technical Development Fund* (CTDF),[196] the *National Scientific Research Fund*[197] and the *Fund Closing up with European Higher Education.*[198] Contribution to CTDF is a compulsory for each economic entity, is very similar to tax in character, but is levied in a different way. The money raised in such a way, is spent on activities loosely connected to technological research and covering such a wide variety of issues as the establishment of infrastructure for scientific research, the practical implementation of scientific results, standardization and legal protection.[199] The fund also gives support to researchers and research institutes through offering wage-like benefits, scholarship grants, and investment in laboratory equipment.

IV. Sectoral aid

In their study on state aid *Evans and Martin* argued that a clear distinction should be made between the granting of sectoral aid within the framework of Community policies and the intervention by the state in those sectors where the Commission may not act as the enforcer of Community policies. Although in the former case it is not always clear how the Community policies and the relevant system of national measures, which are in principle designed to facilitate the implementation those policies, are related. For this reason regulations adopted on recommendations from and by the Commission in respect of several economic sectors, such as the *coal* and *steel industry*,[200] *agriculture*,[201] *fishing*,[202] and *transport* by *road, rail* and *inland waterways*[203] have rendered the rules on aid more transparent.

In the latter case, where no parallel policies exist, the Commission confined itself to formulating legally non-binding non-mandatory principles[204] extending state aid to the *textile*[205] *and synthetic fibres*[206] *industry, motor vehicle industry,*[207] *and to public*

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195 98/305 Com. Dec. concerning aid from the French government to an undertaking in the motor vehicle sector—Peugeot SA. O.J. 1989 L123/52-58.

196 Act IX of 1988 as modified (on several occasions).

197 Gov. Decree 99/1990 of December 3.

198 Act LXXX of 1992.

199 In essence it is in line with the relevant EC policy.

200 3484/85 Dec. [O.J. 1985 L340/1], 2064/86 Dec. [O.J. 1986 L177/1], 3855/91/ECSC Dec. establishing Community rules for aid to the steel industry [O.J. 1991 L362] Dec. O.J. 1992 [31 July, 1992].

201 Council Reg. 797/85 O.J. 1985 L93/1, Council Reg. 355/77 O.J. 1977 L51/1.

202 Council Reg. 101/76 O.J. 1976 L10/19; Guidelines for the examination of state aids in the fisheries and acquaculture sector [O.J. C152. June 17, 1992].

203 Council Reg. 1107/70 J.O. L130/1.

204 Advocate General Damon's opinion expressed in 310/85 Deufil [1987] E.C.R. 901, p. 914.

205 The first such aid was implemented in 1971. See Evans and Martin (1991) p. 92.

undertakings in the air transport and the manufacturing (assembling) sectors.[208] The general (characteristics) features of Community policy in the textile and synthetic fibres industry also appertain to other sectors to a certain extent. After having been modified on several occasions since 1971, the Community policy has focussed on *restructuring* on the one hand, and on *job creation* on the other. Regarding both industries the principles adopted by the Commission attribute paramount importance to a radical cutback in the total quantity in output, a complete change in the product (profile) range of former textile and synthetic fibres producers and to research and development.[209] The Commission realized that within one particular sector the situation of certain sub-sectors may be diverse and therefore authorized the granting of 'high-priority' aid to these sub-sectors.[210] As soon as the industries in question were beginning to show signs of improvement, the Commission realized its vigilance, but when in the early 90's new problems emerged, in a Communication to the member States, the Commission made its position clear by announcing that no aid aimed for increase in production (capacity) would (will) be endorsed.[211] Shipbuilding is one of the sectors being given a special (treatment) treated separately. As the shipbuilding industry of the Communities would not be competitive in the absence of aid on the world market, the Council has adopted several directives authorizing aid to promote restructuring in sofar as such aids effectively ensure the long-term viability of the shipbuilding sector without having to apply for further support. The eighth and the latest directive to date regarding this sector was adopted by the Council in 1992.[212]

The Commission's assessment of a concrete case of sectoral aid mostly depends on the *condition of the market.*[213] In times of economic recession the Commission might

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206 Commission notice on the extension of the code limiting aid to synthetic fibres industry [O.J. C179 July 16, 1992]; Aid to the synthetic fibres industry; Commission Communication [O.J. C186, July 18, 1991]; Code on aid to the synthetic fibres industry [O.J. C346. December 30, 1992].

207 See Evans and Martin (1991) p. 92 on the prehistory; Aid to the motor-vehicle industry: Community framework on state aid to the motor vehicle industry was published on March 26, 1991 [O.J. C81]; Community framework for state aid to the motor vehicle Industry appeared on February 2, 1993, extending the force of previous regulation.

208 Commission Communication to the member States—application of Articles 92 and 93 of the EEC Treaty and of Article 5 of the Com. Dir. 80/723/EEC to public undertakings in the manufacturing sector [O.J. C273. December 31. 1991].

209 Butterworths (1993) VII [288].

210 VIth Report on Competition Policy 1976, Point 233.

211 O.J. [1991] C186/11; A summary of detailed rules related to other sectors are to be found in Butterworths (1993).

212 Council Dir. 90/864 [O.J. L380/27 of Dec. 31, 1990] as modified/amended by Council Dir. 92/68 [O.J. L219 of August 4, 1992].

213 Manfred Caspari, leader of DG IV was quoted by Bermann (1993) p. 886 as saying: "In the current economic situation the Commission is beginning to view with growing concern investment aid granted to sectors already struggling with overproduction ... In the past few years the subsidization of the synthetic fibres industry has been almost entirely forbidden/prohibited, and ... [the Commission] ... has also taken a hard line on the textile and clothing industry."

seem more inclined to permit aid, in case it *ensures smooth adjustment*[214] and contributes to the furtherance of the Communities' economic and social objectives.[215] The criteria[216] employed by the Commission in analyzing sectoral aid are well-defined and highlight on three different aspects:

As the Commission seems unable to prevent protectionist economic policies by Member States, it has to content itself with placing restrictions on them to a certain degree. It will entirely depend on the interplay between the dominant political forces, in what way the Association Council will have to apply the restrictive rules pursued in sectoral policies.

Conclusions

It is difficult to determine the impact of the state aid provisions of the Europe Agreement, concluded between the then European Communities and the Hungarian Republic on Hungarian economic policy. The impact will certainly depend on how the vessels of the Hungarian economy as well as the aircraft-carrier of Europe will fare on the waters of the international economy and how the regulatory technics of the European Union will change. It is very difficult to formulate an academic view, let alone an educated guess about these conditions. Yet, three factors may already be anticipated. The *first* is that it is open to debate when Hungarian state aid rules and practice would have to conform fully to the requirements of the European Commission. 'This paper argues that these rules require immediate compliance. Though this requirement may be mitigated taken into consideration the backwardness of the Hungarian economy, yet it would be foolish to hope that Hungary may—on the basis of this agreement—peacefully subsidize for another half decade and the Commission will tolerate this. The depth of the duty to harmonize incurring by Hungary uner the Europe agreement is also open to debate—and that is the *second* factor that has to be settled urgently. This is a question of major importance as the Association Council will have to take into consideration—in carrying out its harmonization activities under Article 62 of the Europe Agreement—not so much legal rules but soft law or fully discretionary Commission measures. The *third* factor is that Hungary should posess a clear strategy about the positions it is going to take in the Association Council on the direction of the legislative activities to be carried out in the framework set out in Association Agreement. This strategy should address the question how short and long term Hungarian interests may be reconciled. It is in the

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214 Com. (78) 221 Commission Communication to the Council of May 25, 1978 on the general policy regarding sectoral aid.

215 Evans p. 93; Cownie p. 253 maintain that in case the market is not able to attain the set objectives or if the fulfilment of these objectives requires an unacceptably long period of time, the provision of aid be permitted even if its effect is obviously detrimental to the market forces.

216 VIIIth Report on Competition Policy 1978, Point 128.

long term Hungarian interest to portray Hungary as an easy and reliable partner capable to comply immediately and to a large extent with all community rules.

Bibliography

Adamantopoulos, K.: *Subsidies in external trade law of the EEC: towards a stricter legal discipline* in: (1990) 15 ELR pp. 427–459.
Alexander, D.: *State aids in the nineties* in: New Law Journal January 1990 pp. 21–24.
Berlin, D.: *L'adoption du régime des entreprises publiques aux normes internationales et communautaires* in: RTDE. p. 232. 1983.
Bermann, G., Goebel, R., Davey, W., Fox, E.: *Cases and materials on European Community law* (West Publ. Co. St. Paul, 1993)
Beseler, J. F., Williams, A. N.: *Anti-dumping and anti-subsidy law* (London, Sweet and Maxwell, 1986) *Butterworths Competition law Guide* 2 & 3 (Butterworth, London 1991–1993)
Cownie, F.: *State aids in the Eighties* in: (1986) 11 ELR pp. 247–267.
Dony-Batholme, M.: *La notion d'aide d'Etat* in: IX CDE 3–4. pp. 399–415.
Evans, A. & Martin, S.: *Socially acceptable distortion of competition: Community policy on state aid* in: (1991) 16 ELR pp. 79–111.
Flynn, J.: *State aid and self-help* in: ELR pp. 297–312.
Goodliffe, J.: *State aids and recalcitrant members* in: New Law Journal 7 September, 1990 pp. 1238–1239.
Grabitz, E. & Zacker, C.: *Scope for action by the EC Member States for the improvement of environmental protection under EC law: the example of environmental taxes and subsidies* (1989) 26 CMLRev p. 423.
Green, N., Hartley, T. & Usher, J.: *The legal foundations of the Single European market* (OUP, Oxford, 1991)
Gyselen, L.: *La transparance en matière d'aides d'Etat: les droits des tiers* in: IX CDE 3–4. pp. 416–444.
Gyselen, L.: *State action and the effectiveness of the EEC Treaty's competition provisions* in: 26 CMLRev p. 33, 1989.
Hellingmann, K.: *State participation as state aid under Article 92 of the EEC Treaty: The Commission's guidelines* in: 23 CMLRev pp. 111–133, 1986.
Hultin, C.: *The effects of state aid on employment and investment in the French textile and clothing industry* in: International Journal of Industrial Organisation 1989, pp. 499–501.
Inotai, A.: *Válaszúton az Európai Gazdasági Közösség (European Economic Community at Cross Road)* (Kossuth, Budapest, 1985).
Kent, P.: *Államigazgatási jog (European Community Law)* (Longman, London, 1992)
Lasok, D.: *State aids and remedies in the EEC* in: 7 Eur. Comp. L. Rev. p. 53, 1986.
Madarász, T.: *The Law of Public Administration* (1991, Budapest)

Martin, J. and Stehmann, O.: *Product market integration versus regional cohesion in the Community* in: (1991) 16 ELR pp. 216–243.
Mortelmans, K.: *The compensatory justification criterion in the practice of the Commission in decisions on state aid* in: 21 CMLRev p. 405, 1984.
Pappalardo, A.: *State measures and public undertakings: Art 90 of the EEC Treat Revisited* in: 1 Eur. Comp. L. Rev. p. 29, 1991.
Quigley, C.: *The notion of state aid in the EEC* in: (1988) 13 ELR pp. 242–256.
Ross, M.: *State aids 1987–88* in: (1989) 26 CMLRev pp. 168–192.
Ross, M.: *Challenging State aids: the effect of recent developments* in: 23 CMLRev. p. 867, 1986.
Schina, D.: *State aids under the EEC Treaty, Article 92 to 94* (ESC Publishing Ltd, 1987)
Slot, P. J.: *Procedural aspects of state aids: the guardian of competition v. the subsidy villains* in: 27 CMLRev 1990, pp. 741–760.
Slot, P. J.: *Procedural and substantive compliance required* in: 16 ELR pp. 38–47, 1991.
Vaughan, D.: *Law of the European Communities* (Butterwoths, London, 1986)
Weatherill, S. and Beaumont, P.: *EC law* (Penguin, London, 1993)
Winter, J. A.: *Supervision of state aid: Art 93 in the Court of Justice* in: 30 CMLRev 2, pp. 311–329, 1993.
Wise, M and Gibb, R: *Single market to a social Europe* (Longman, Essex, 1993)
Wishlade, F. G.: *Competition policy cohesion and the co-ordination of regional aids in the European Community* in: 4 ECLR [1988] pp. 143–150.
Wyatt, D. and Dashwood, A.: *European Community Law* (Sweet and Maxwell, London, 1993)

Community sources

EC Commission: Report on Competition policy I-XXII ISBN [92] 92-826-6126-1
EC Commission: A guide to the grants and loans from the European Community 1991, London, ISBN 0902335103
EC Commission: An empirical assessment of factors shaping regional competitiveness in problem regions 1990, Luxembourg ISBN 9282603628
EC Commission: Evaluation of policy measures for the creation and development of small- and medium-sized enterprise 1989, Luxembourg ISBN 92-826-0104-8
EC Commission: The aid element in state participation to company capital 1989, Luxembourg ISBN 92-825-9510-2
EC Commission: The effect of different state aid measures on intra-Community competition 1990, Luxembourg ISBN 92-826-0381-4
EC Commission: The effects on intra-Community competition of export subsidies to third countries, the case of export credits, export insurance and official development assistance 1990, Luxembourg ISBN 92-826-0352-0

Karel van Miert: The granting of state aid and control of subsidies in the European Community (speech pronounced on the 5 July 1993)
Karel van Miert: Competition policy in the 90's (speech pronounced on the 11 May, 1993 in Chatham House, UK)
Communication from the Commission to the Council and the ECSC Committee, pursuant to Art 53(a) of the ECSC Treaty on Financial arrangements for the restructuring of the Steel industry Sec (93) 1241 final (8 September, 1993)
Press Communiqué on the Council Meeting No. 1623 (24 November 1992) 10091/92 (Presse 219)

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Developments in the National and International Protection of Copyright

Do existing laws and procedures adequately protect copyright owners in this technological era? Mass use of copiers in offices and libraries facilitates the abuse of reprographic rights, i.e. facsimile reproduction in paper form. This paper outlines how the new *Irish Copyright Licensing Agency,* a joint initiative by authors and publishers, has devised collective licensing and royalty collection procedures to protect the interests of authors (publishers and facilitate educational institutions and other users of copyright printed material.[1] International aspects are also outlined.

Background

"To every cow her calf and to every book its copy".
"Le gach bo a buinin, agus le gach leabhair a choip".
(From Irish language, Gaelic, version)

So held Diarmaid Mac Cearrbheoil, High King of Ireland, finding in favour of the plaintiff in the historic case of *St. Finnian of Maigh Bhile v. St. Colmcille,* 560 AD. The plaintiff demanded return of a Gospel book and its copy made secretly by the defendant without consent. In his judgment, Diarmuid rejected plaintiff's arguments that the copy was his property. Copyright was an exception to the general principle of the Brehon laws,

1 The Irish Copyright Licensing Agency What it is and What it Does: Information Leaflet, Irish Writers Centre, 19 Parnell Square, Dublin 1, Ireland. Phone (01) 729090

the ancient Irish legal code, that property such as land belonged to the clan.[2] Thus even in ancient times a right to fruits of literary efforts was recognised. The principle in *Finnian v Columcille* was enshrined widely in jurisprudence (not necessarily on the basis of that Celtic precedent) to protect intellectual property rights by copyright. (Modern Irish law derives from common law and equity, rather than from ancient Irish celtic laws such as the Brehon code. European Community law and civil law concepts are now influencing Irish law.)

Legal systems generally try to achieve a balance between two public interests: reward for the personal ingenuity of owners of rights and organised society's demands for access to printed information. In *Sayre v Moore,* a case of 1785 re the copying of maps, Lord Mansfield referred to the need to reconcile the rights of creators and users.[3]

Copyright and Creativity

The relationship between copyright and creativity was explored by US Judge Richard A. Posner.[4] There is an analogy with primitive agriculture in a society without property rights where anyone could reap the benefit of others' efforts. Work shifted to more rewarding activities. The position of authors' creativity is more complex. As Judge Posner explains, authors write for reasons other than money. Inner satisfaction, hope of immortality, prestige or fame may be the spur. Copyright law was not so necessary in the past when printing was licensed. It was so time–consuming and expensive to copy a book that it would be more economical to buy an original volume and directly reward the author.

Legislation

The first English Copyright Act was passed in Queen's Ann reign, 1709 (8 Anne c. 19). That legislation was narrower than modern Acts and it did not protect translations from foreign languages. Protection was mainly for booksellers who then were also publishers. Much classical literature from the nodder Homer to the plagiarist Shakespeare was created prior to copyright Acts. The Irish Copyright Act 1963 (the 1963 Act), provides in s. 7 (1) that copyright in a work is the exclusive right to do, or to authorise other persons to do, certain acts in relation to that work which in the relevant provisions are designated acts restricted by the copyright in a work of that description.[5] Restricted acts include not only the obvious e.g. publication and public performance or broadcast as appropriate, but also reproducing the work in any material form. To put readers on

2 Murdoch, H., *A Dictionary of Irish Law.* Topaz, Dun Laoghaire.

3 *Sayre v Moore,* 1785, quoted in Clarke, Hadley & Copyright Licensing Agency Ltd. UK (CLA), pamphlet, *Collective Administration of Literary Works, Principles and Practice: The British Experience 1991, London, UK.*

4 POSNER, *Law and Literature A Misunderstood Relation* Harvard Univ. Press, 1988.

5 *Phonographic Performance Ltd V Somers* [1992] ILRM 657.

notice, most modern publications refer to rights reserved and also prohibit photocopying and recording without copyright holders' permission. No formal registration is required to establish copyright.

Ss. 12 & 14 for fair dealing exceptions e.g. research, private study, criticism or review, lack the detailed provisions of s. 29, UK 1988 Act. Irish Law is inadequate for modern purposes. In Ireland, students may copy within limits (10% of a work) for strictly personal research or study but multiple copying without permission is illegal. Widespread copying by individuals on the instructions of educational institutions is arguably stretching fair dealing to the point of illegality.

Infringement and emedies

S. 7 (3) of the Irish 1963 Act provides that copyright is infringed by any person who, not being the owner of the copyright, and without licence of the owner, does or authorises another person to do any restricted acts. Infringement of copyright is actionable at the suit of the copyright owner. Part IV, ss. 22–28 1963 Act, provides for remedies. Different remedies may be appropriate: injunction, an order for account, damages, action for conversion; criminal sanction under the Copyright (Amendment) Act 1987; and *Anton Pilar* order for search and seizure of documents.[6]

Controlling copying under copyright law

Existing copyright law may seem too restrictive or too expansive depending on the interests involved. Even allowing for fair dealing exceptions, existing law is being widely abused by offices, educational users and libraries. Warnings at the start of books clearly assert legal rights and try to prohibit unauthorised photocopying. (Even without such warnings, rights exist.) Unauthorised copying is illegal and enforcement actions are a threat to individuals and bodies flouting the law. In a recent landmark decision, *Texaco,* a New York Federal District Court held that copying journal materials for employees use was not fair use, and that permission and compensation were required.[7] It may be difficult to produce evidence of infringement by copying.[8]

The Irish copyright licensing agency (ICLA)

As photocopiers are commonplace, it is difficult for individual copyright holders to prevent abuse of their rights. Control by a special agency is the effective solution

6 Anton Pilar KG v Manufacturing Process Ltd. [1976] 1 All ER 779–784.

7 *American Geophysical Union et al. v Texaco* quoted in *The Bookseller* 31/7/1992 & *Publishers Weekly* New York 3/8/1992.

8 *Antocks Lairn v Bloohn* [1971] FSR 490; *Sifam Elec. v. Sangamo Weston* [1971] FSR 337; [1971] 2 ALL ER 1074.

matching concepts of copyright as a multiple bundle of rights which can be assigned or licensed together or separately. The ICLA is an non-profit making company limited by guarantee, recently incorporated with equal representation on its board and in its membership by authors and publishers. The articles of association provide that the board be chaired in alternate years by a publisher and author nominee. Publisher Michael Gill is chairman and author Eilis Dillon is secretary. (She visited Hungary a few years ago on a writers' exchange and spoke on Budapest radio. Exchanges are being negotiated between the Irish and Hungarian Writers' Unions.) Muireann O'Briain, barrister, advises the Agency board. The ICLA will operate through mandates from writers and publishers. Authors' unions support the initiative. ICLA will exercise sensible control over photocopying and provide users with an easy means of obtaining permission to copy.[9] ICLA will act as a clearing centre for dealings between owners and users of copyright material. Users such as schools, universities, tutorial centres, commercial firms, Government Departments and agencies, public bodies, professionals and individuals will be able to comply with copyright law through the ICLA.

New licensing system

ICLA will licence the photocopying of brief extracts from published works. The limits are 5% of a book or an entire poem story not exceeding ten pages. Libraries and other heavy users will have to keep records or agree to a survey system. ICLA will collect appropriate fees from users and income will be passed on to publishers and authors. *Carte blanche* unrestricted copying will not be allowed. Limitations and conditions of copying will be clearly stated to all licensees. Publishers will be relieved of unproductive work such as individual correspondence.

International dimension

The ICLA system mirrors collection agencies abroad. A reciprocal arrangement is being signed with the UK agency. ICLA hopes to negotiate with other members of the International Federation of Reproduction Rights Organisations (IFRRO) so that payment for Irish-published works can be collected abroad. An encouraging precedent is that the Australian Copyright Agency Ltd., having negotiated royalties from the Federal Government for press cuttings circulated in the civil service, is now focusing attention on abuses in the educational sector.[10] *The Declaration of Human Rights,* article 27, 1947, asserts both sides of the copyright coin: individuals' cultural rights and authors' rights to protect their moral and material interests.[11]

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9 *ICLA* Information Leaflet, 1 supra.

10 *European Intellectual Property Review National Reports* vol. 14.11.92, Sweet & Maxwell, ESC.

11 *Universal Declaration of Human Rights* Art. 27. 1947, referred to in Clark, *Photocopying from Books & Journals,* pamphlet, British Copyright Council, 1990.

Many countries, including Ireland, are members of the Berne Copyright Union and or the Universal Copyright Convention.[12] In countries other than that of origin, authors are given not only rights of domestic laws of those countries but also rights granted by the Union. Works published in any country of the Berne Union or Universal Copyright Convention (UCC) are protected in the Irish Jurisdiction as if the works were first published in the State.[13] UCC formalities require the use of the symbol (c) on all published copies of works, plus copyright owner's name and year of first publication.

EC aspects & law reform

EC harmonisation initiatives in the Intellectual Property field, aimed at removing impediments to the free movement within the *Internal Market*, are a spur to reform of national copyright law. Differences between such laws impede progress.[14] Access of Member States to various international conventions facilitates approximation of laws. The common law copyright concept, as known in Ireland and the United Kingdom, contrasts with civil law continental concepts, especially *droit d'auteur*. The latter, which evolved from the enlightenment and the French Revolution, relates to authors' absolute control over creations of the mind. Copyright law, based on economic arguments, is more suited than the abstract *droit d'auteur* to protecting computer software. Common law regimes, such as Ireland and the UK, are becoming more conscious of authors' moral rights i.e. non-economic rights of paternity and integrity in their work.

Other Rights

There are also neighbouring rights e.g. of performers and moral rights to the creative integrity of literary works. A proposed EC Council Directive aims at harmonising the protection of authors, performing artists, broadcasters and film producers, regarding rental and lending rights and certain other rights.[15] Member States may derogate from the exclusive lending rights for cultural reasons but not affecting the obligation to remunerate

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12 *Berne Copyright Union; Universal Copyright Convention.*

13 *Copyright (Foreign Countries) Order 1978 (SI 132/3 of 1978).*

14 Prof. John N. Adams (Director, Common Law Institute of Intellectual Property), *Harmonisation of EC Intellectual Property Law: An Overview* Irish Centre for European Law, (ICEL), Trinity College, Dublin, (TCD), conference, November 1992.

15 *EC Commission Document* COM (90) 586 final–Syn 319 (*OJ* No. C. 53, 28. 2. 1991, page 35) and *EC Bulletin 12. 1990,* referred to in *EC Brief* 3, 58 & 115, 1992 update, Gregg Myles, solicitor, Locksley Press, Lisburn, BT28 3BG, Northern Ireland *Textbooks:* Coppinger & Skone James, *Copyright,* Sweet & Maxwell Laddie, *Modern Law of Copyright,* 2nd ed. Butterworths, 1987 Stewart, *International Copyright & Neighbouring Rights,* Butterworths, London, 1983; Intellectual Property Paul Coughlan (ed.), Irish Centre for European Law (ICEL), Trinity College, Dublin, 1993; *Intellectual Property & Internal Market of EC* Groves, Martino, Miskin & Richards. Graham & Trotman/Martinus Nijhoff.

authors equitably. The Irish Department of Enterprise and Employment, through the Controller of Patents who has powers under the 1963 Act would deal with reform of Irish copyright Law taking EC studies and measures into account. The Irish copyright Acts 1963–87 should be replaced by a modern Act, providing for fair dealing by libraries, as under s. 29, UK 1988 Act.

European Dimension

Europe, of course, is wider than the EC. There is a vibrant Europe of the Danube. The changes in Eastern and Central Europe have made the EC Member States and citizens more aware of the greater Europe. The Council of Europe Recommendation No. R.(90) *11 of the Committee of Ministers* suggests that States should consider facilitating voluntary licensing schemes in the course of assisting those who own rights to enforce them, as well as helping users to obtain permission to copy. Therefore, writers should look forward to developments of protection and reciprocal arrangements throughout Europe.

Ireland, Hungary and EC

A Treaty between two imperial powers: United Kingdom (then consisting of Great Britain and Ireland), and Austria–Hungary on the other side, signed at Vienna on 24 April 1893 provided for reciprocal arrangements to protect authors of literarty or artistic works and their legal representatives, including publishers. The course of history has dictated that the relevant Imperial high contracting parties would lose their Empires. Ireland (the Republic, excluding Northern Ireland which remains part of the United Kingdom) and Hungary are now independent States with freedom to co-operate for copyright and other purposes. Ireland's membership of the European Community, to which Hungary also aspires, does involve some loss of sovereign rights. The Association Agreement between Hungary and the EC in 1991 is relevant. Hungary has been spurred to prepare new intellectual property laws e.g. harmonising its patent laws.

An example of cultural co-operation is the exchange system between the Writers Unions in Ireland and Hungary which is being developed further. In Budapest, I understand that there is an Irish–Hungarian Society. There is also an Irish–Hungarian Economic Association, the President of which is H. E. Dr. Istvan Pataki, the Ambassador of Hungary to Ireland. Irish companies, especially in the semi-State sector are involved in joint ventures with Hungarian enterprises, for example the Irish Electricity Supply Board International and ETV, engineering consultants. Telecom Eireann's feasibility study on the financing of Hungarian telecommunications led to active involvement in new arrangements. Co-operation in the intellectual property area, especially on copyright and reciprocal arrangements, would be a logical progression in Irish–Hungarian relations, building on historical parallels, including Celtic strands. Similar links regarding intellectual property could be developed with other Central and East European countries and with EC Member States.

Conclusion

It is a long time-span from the unauthorised copier, Clumcille, famed in ancient Irish history, to modern copying machines. The universal need to protect individuals' rights to literary efforts has spurred modern initiatives at global and national level. The Irish Copyright Licensing Agency (ICEL) provides a practical solution to the problem of widespread abuse of authors' and publishers' rights by unauthorised copying. Users of copyright material in libraries, education, administration and the professions should be aware of developments and in their own interest co-operate with the ICLA licensing system. Co-operation with agencies in other countries would be to the mutual advantage of authors' rights, developed within a modern code of intellectual property law.

Thank you for your attention. While asserting my rights to this paper, I am open to sharing my information in response to questions or comments from my receptive audience.[16]

16 Thanks to: my colleagues at the Bar of Ireland, Law Library, Four Courts, Dublin 7, James Bridgeman and Muireann O'Briain, for their help during my research, and to Dr. István Pataki, Ambassador of Hungary to Ireland and Ms. Lynn Hunt, of the Hungarian Embassy, Dublin.

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Akadémiai Kiadó,
Budapest

Alexander VIDA

The First Hungarian Judicial Decisions Relating to the Vienna Convention on International Sale of Goods

Thanks to the role assumed by the late Professor Gyula Eörsi, as one of the promoters[1] of the UN Convention signed on 11 April, 1980, Hungary too was among the first signatories of this Convention which has been in force in Hungary since 1 January, 1988. Nevertheless, in Hungary, just as in other countries, some time was needed until decisions worth interest were in fact taken. We are going to deal here only with two of those related to the forming of contracts.

1. Orders made by telephone: the applicable law

The German plaintiff and the Hungarian defendant were in commercial relations since a certain time, the plaintiff having furnished goods on a series of orders. A bill was left unpaid and the Hungarian defendant pretended that he have not ordered the goods in question. The order was made by telephone without any further written confirmation.

As a matter of fact Hungary signed the Vienna Convention with the reservation provided in Article 96 of the Convention. In conformity with this Article, the rulings of Article 11 of the Convention, concerning the validity of contracts not concluded in writing, are not applied in Hungary.[2]

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1 The Diplomatic Conference in Vienna was presided by him. EÖRSI, Gy.: A propos for the 1980 Vienna Convention on Contracts for the International Sale of Goods. The American Journal of Comparative Law. Vol. XXXI (1983) No. 2. pp. 336 et seq.

2 The dispositions of Art. 12 of the Convention.

However, in its decision taken on 24 March, 1992,[3] the Municipal Court of Budapest stated that the order made by telephone was valid, and consequently ruled that the defendant should pay the amount charged on the invoice.

In fact, the Court's opinion was that, the case fell under the rules of Hungarian private international law. According to Sec. 25 (a) of the Hungarian Code on International Private Law[4] in respect of contracts for sale, the seller's right is to be applied. Consequently, in the case under discussion the rules of German law are to be applied with regard to the validity of a contract made by telephone.

As provided by Sec. 147 (1) of the German Civil Code (BGB), contracts orally concluded are valid, and therefore, in the present case, the validity of the contract cannot be contested.

After having taken a position on this issue, the Court referred to the Vienna Convention by applying Article 9, paragraph 1 of the latter, which rules that the Parties are legally bound by the practice established between them, namely that one in conformity with the terms of Article 14, paragraph 1, the goods, their quantity and price were implicitly determined in consequence of the Parties' continuous commercial relations.

Since it was also proved that the buyer had received the goods delivered, he also had to pay the amount of their price in conformity with the terms of Article 53 of the Convention.

Taking into consideration that the Convention does not regulate the amount of the interests, and in conformity with Sec. 213 (1) of the German Code of Civil Procedure, according to which the Court is bound to take a position on all petita, German law, namely Section 352 (1) of the Commercial Code (HGB) providing a 5 per cent interest, was applied also in its decision on the interests.

The decision of the Municipal Court was final. Our observations:

With our respect to the international law, the legislators yielded in fact to the insistence of the ex-USSR[5] when forming Article 12 of the Convention. The former Hungarian régime, having made reservations regarding the terms of Article 96, acted on the one hand under Soviet influence[6] and, on the other hand, took into consideration the specific conditions of a socialist economy. It is only to be hoped that once the privatisation of national economy has made sufficient progress, Hungary will change its standpoint on this issue.[7]

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3 See the comments of Vida (relying on an article in Hungarian by Székely) Zur Anwendung des UN-Kaufübereinkommens in Ungarn. IPRax 1993. pp. 263 et seq.

4 German translation in Brunner, Schmid and Westen: Wirtschaftsrecht der osteuropäischen Staaten. Baden-Baden 1991, Ungarn X. 1. et seq.

5 Schlechtriem (Editor), Kommentar zum einheitlichen UN-Kaufrecht. München 1990, Art. 12. CISG, Note 1.

6 The USSR, the Ukraine, Belorussia, etc. acted also in this way.

7 More categorically VÉKÁS, L.: Das internationale Kaufrecht im "Ostgeschäft" in Hoyer and Posch. Das Einheitliche Wiener Kaufrecht, Wien, 1992. pp. 215, 222.

Also in the Hungarian literature dealing with the subject, preference seems to be given to the solution adopted by the Court: if, as a consequence of the reservation provided by Article 96 of the Convention, the latter should not be applicable, it should be replaced by national international private law.[8]

Our last observation concerns the Code of International Private Law: when establishing the régime of the seller's right, the rules of Section 24 (a) of the Code were motivated by the Hungarian legislator's wish to find a linkage point corresponding to the most characteristic element of the contract for sale—taking into consideration the typical economic, social and juridical context of this kind of contracts. Schnitzer and Savigny had already argued for such a regulation[9]—adopted by the Hungarian legislator.

2. *Imprecision of the offer: invalidity of the contract*

The American plaintiff Pratt and Whitney (P and W) asked in his request the establishment of the fact that the contract negotiated with the Hungarian defendant, the MALÉV air company, had been formed validly.

Since the case was of major importance, the plaintiff, after having brought the request before Court, launched a press campaign to which the defendant gave an answer on his turn. Before dealing with the decisions taken, we give a short account of the facts as reported by the press.

The defendant envisaged to buy jet engines for its No. 737–200 Boeing fleet of aircraft and entered into negotiations with the plaintiff in September 1990. The latter addressed to the defendant an offer of 15 pages on 9 November, 1990 and, on 14 December, added to it complements advantageous for the defendant. The offer contained the conditions of delivery, guarantee, maintenance, the training of employees and payment. The purchase price was about 50 million dollars. 21 December, 1990 was the deadline of acceptance for the defendant.

On the last day the defendant addressed a letter to the plaintiff, saying they had the pleasure to inform P and W that MALÉV had chosen the PW4000 engines as jet engines for their fleet of aircraft. In the same letter the defendant asked the plaintiff to treat the transaction confidentially until a joint press conference be organised. A few months later, when the director general of the defendant travelled to New York, he confirmed the engagement of MALÉV to P and W offer.

However, two weeks after this second declaration the defendant informed the plaintiff in writing that they would send invitations for a new tender of supplies. Thereafter the defendant said to have made only a declaration of intention and that no contract had been concluded; shortly after they even signed a contract with General Electric on the delivery of jet airline engines.

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8 VÉKÁS op. cit. p. 223.

9 MÁDL, F. and VÉKÁS, L.: The Law of Conflicts and Foreign Trade, Budapest, 1987, p. 224.

On 10 January, 1992 the Municipal Court of Budapest took a decision—in fact a partial one—judging that the contract had been concluded validly.[10] In this partial decision no position was taken on the restitution of the costs of discovery procedure (USD 64,816,20), but only on the conclusion of the contract. As to the applicable law, the Court applied the Vienna Convention.[11]

Considering the statements referred to in the press, we simply observe in respect of this point, that in spite of the defendant's request demanding the Court to apply American law—that of the State of Connecticut in this special case—as envisaged in the offer, the Court adopted the Vienna Convention, based on the fact that both Hungary and the United States were members of the latter. (It is to be mentioned that this standpoint was confirmed by the Supreme Court.)

As a result of the appeal lodged by the defendant, the Supreme Court took as a first step the decision that, since the conditions established in Section 213 (2) of the Code of Civil Procedure regarding partial decisions were not given, it was necessary to judge on all aspects of the case. The Supreme Court later stated that the contract had not been formed validly, and that only a declaration of intention had been signed by the defendant. Consequently the claim was rejected by the Supreme Court.[12]

As regards the legal assessment of the facts, the supreme Court referred to Article 14, paragraph 1 of the Convention which provides that an offer should be sufficiently precise. This was not the case here, since neither the object of the supply nor the price were described with sufficient precision. In consequence of the imprecise offer, the plaintiff's declaration did not constitute an acceptation either. Thus, one had to do only with a declaration of intention for a contract.[13]

The Supreme Court also pointed out that although Article 2, item e of the Convention does not apply to the sale of aircraft, this exclusion concerns only complete aircraft but does not apply to their parts.[14]

Commenting on the divergent results to which the first and the second instance have arrived at, we can simply remark that while the decision of the first instance was motivated by considerations regarding the ethics of sales negotiations, the Supreme Court strictly observed the law.

General conclusions

A certain number of lawsuits in which the Vienna Convention is being applied are before the Municipal Court of Budapest and also before the Arbitration Court of the

10 Magyar Nemzet of 11 January 1992, p. 5.

11 Kurir of 11 January 1992, p. 3.

12 Népszabadság of 26 September 1992, p. 5.

13 MAGNUS, Aktuelle Fragen des UN-Kaufrechts. Zeitschrift für Europäisches Privatrecht 1993. No. 1. p. 86.

14 Magnus: op. cit. pp. 84 et seq.

Hungarian Chamber of Commerce. The practice of applying a unified law is getting established.

In this respect decisions taken in other countries and even those pronounced under the old régime of the Hague Convention can constitute valuable points of orientation also for Hungarian jurisprudence, even though Hungary has not been a member of this latter.

Thus jurisprudence is taking important steps towards the internationalisation of law—goal wished for since a long time.

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